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90-232

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ATTORNEY GENERAL OF CALIFORNIA,
et al.,
Petitioners,

v.

TRANS WORLD AIRLINES, *et al.*,

Respondents.

PETITION OF THIRTY-THREE STATE ATTORNEYS GENERAL FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The Fifth Circuit's decision raises fundamental questions regarding the jurisdictional bounds of a federal district court and the ability of states to enforce their police powers in areas of concern which, under our system of federalism, have traditionally been left to the states.

The questions presented are:

1. Whether the Federal Aviation Act's preemption of state laws "relating to rates, routes, or services" is, although silent on the issue, so broad as to insulate airlines from state prosecution for violation of state laws prohibiting the use of false advertising and deceptive or unfair business practices?

2. Whether a federal district court has jurisdiction to enjoin:

   A. State attorneys general not before it from enforcing their own constitutionally-adopted state laws prohibiting deceptive advertising?

   B. The possible future enforcement of the laws of 34 states against possible future false advertising of airline plaintiffs when no case or controversy currently exists and the district court lacks subject matter jurisdiction?

   C. Thirty-three state attorneys general from enforcing the deceptive advertising laws of the respective states, when it has no

personal jurisdiction over them and there is no nexus between the forum state and the 33 attorneys general?

The Fifth Circuit's decision is based on its misreading of the "relating to" language in section 105 of the Federal Aviation Act ("FAA"). The decision of the Fifth Circuit directly conflicts with the Ninth Circuit's holding in *Air Transport Ass'n v. P.U.C. of California*, 833 F.2d 200 (9th Cir. 1987) *cert. denied* 108 S.Ct. 2904 (1988), that the meaning of the words "relating to" as they appear in the FAA are not to be read so broadly as to preempt state regulation of all airline activity. The Fifth Circuit's opinion further conflicts with the following federal district court decisions which agree with the Ninth Circuit's decision: *New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y. 1989); *California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal. 1989); and *Kansas v. Trans World Airlines*, 730 F.Supp. 366 (D.Kan. 1990) and with a decision of the California Court of Appeals which found no preemption of state false advertising laws as applied to airline advertising, *People v. Western Airlines*, 155 Cal.App. 3d 597 (1984), *cert. denied* 469 U.S. 1132 (1985). Further the Fifth Circuit's decision conflicts with a decision of the Court of Appeals for the District of Columbia Circuit which, in agreement with the above cases, also indicates that nothing in the FAA, in and of itself, provides a basis for preemption of state actions against an airline to redress an airline's false advertising. *Alaska, et al. v. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989).

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below include the 33 state attorneys general who are the petitioners herein: DOUGLAS B. BAILY, Attorney General of Alaska; ROBERT K. CORBIN, Attorney General of Arizona; STEVE CLARK, Attorney General of Arkansas; JOHN VAN DE KAMP, Attorney General of California; DUANE WOODARD, Attorney General of Colorado; CLARINE NARDI RIDDLE, Attorney General of Connecticut; ROBERT A. BUTTERWORTH, Attorney General of Florida; JIM JONES, Attorney General of Idaho; NEIL F. HARTIGAN, Attorney General of Illinois; THOMAS J. MILLER, Attorney General of Iowa; ROBERT T. STEPHAN, Attorney General of Kansas; JAMES E. TIERNEY, Attorney General of Maine; J. JOSEPH CURRAN, JR., Attorney General of Maryland; JAMES M. SHANNON, Attorney General of Massachusetts; FRANK J. KELLEY, Attorney General of Michigan; HUBERT H. HUMPHREY, III, Attorney General of Minnesota; WILLIAM L. WEBSTER, Attorney General of Missouri; ROBERT M. SPIRE, Attorney General of Nebraska; BRIAN McKAY, Attorney General of Nevada; ROBERT ABRAMS, Attorney General of New York; LACY H. THORNBURG, Attorney General of North Carolina; NICHOLAS J. SPAETH, Attorney General of North Dakota; ANTHONY J. CELEBREZZE, JR., Attorney General of Ohio; ROBERT H . HENRY, Attorney General of Oklahoma; DAVE FROHNMAYER, Attorney General of Oregon; JAMES E. O'NEIL, Attorney General of Rhode Island; ROGER A. TELLINGHUISEN, Attorney General of South Dakota; CHARLES W. BURSON, Attorney General and Reporter of Tennessee; JEFFREY L. AMESTOY, Attorney General of Vermont;

KENNETH O. EIKENBERRY, Attorney General of Washington; ROGER W. THOMPKINS, II, Attorney General of West Virginia; DON J. HANAWAY, Attorney General of Wisconsin; and JOSEPH B. MEYER, Attorney General of Wyoming.

Additionally, the parties below included Jim Mattox, Attorney General of Texas, who is filing a separate petition for certiorari in this matter, and the respondents, Trans World Airlines, Inc., Continental Airlines, Inc., British Airlines, PLC, Air Canada, Compagnie Nationale Air France, Alitalia-Linee Aeree Italiane, S.p.A., El Al Israel Airlines, Ltd., Finnair, Lufthansa German Airlines, Japan Air Lines Company, Ltd., Qantas Airways, Ltd., Scandinavian Airlines System, Viacao Aerea Rio-Grandense (VARIG) and Pan American World Airlines, Inc.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JIM MATTOX, ATTORNEY GENERAL OF TEXAS, *et al.*,

Petitioners,

v.

TRANS WORLD AIRLINES, *et al.*,

Respondents.

PETITION OF THIRTY-THREE STATE ATTORNEYS GENERAL FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1/] respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on April 3, 1990, which affirmed the granting of a

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1. Jim Mattox, the Attorney General of Texas, is not a petitioning party in *this* petition for writ of certiorari. Attorney General Mattox is filing his separate petition for writ of certiorari to the Fifth Circuit.

The petitioners herein are the 33 attorneys general set forth *supra*, pg. iii. Reference to "33 attorneys general" or "33 states" or "petitioners" refers to all petitioners herein, but does not include the Attorney General of Texas.

The 14 airline plaintiffs will be jointly referred to as "airlines" or "respondents."

preliminary injunction that enjoined 34 sovereign attorneys general from enforcing their own respective state false and deceptive advertising and unfair business practices laws against false advertising by airlines.

The Fifth Circuit's opinion held that, "Unlike the district courts in *New York*, *California* and *Kansas*[2], we believe the history of federal legislation regulating airlines demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only." (897 F.2d 773, 782.) The court's decision was based on its conclusion that even though the subject of the regulation of false advertising of airline fares is nowhere mentioned in 49 U.S.C. section 1305, "it is clear that by enacting section 1305 Congress intended to retain in the federal government, exclusive authority over airline advertising of fares." (*Id.*, at 783.)

Although recognizing that subject matter jurisdiction, unlike personal jurisdiction, cannot be waived, the Fifth Circuit's opinion fails to rule on the 33 attorneys' general claim that the district court lacked subject matter jurisdiction over the airlines' claims against them. The Fifth Circuit's opinion further held that by filing a motion of specially appearing states, "the thirty-three attorneys general became *de facto* intervenors" even though the express purpose of the filing by the 33 attorneys general was to deny the district court's subject matter or personal jurisdiction over them and the appearance at the TRO hearing by the Attorney General of Kansas was to point

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2. *See, New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y. 1989), *California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal. 1989) and *Kansas v. Trans World Airlines*, 730 F.Supp. 366 (D.Kan. 1990).

out the lack of jurisdiction of the district court over these attorneys general.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 897 F.2d 773, and is reprinted in the Appendix at 1a - 30a, *infra*.

The initial opinion and order of the United States District Court for the Western District of Texas, which was signed on January 30, 1989, and from which the Texas Attorney General filed an appeal (case number 89-1142) is reprinted in the Appendix at 31a - 33a, *infra*. On February 27, 1989, the district court signed an order clarifying its order of January 30, 1989. The Clarifying Order is reprinted in the Appendix at 34a, *infra*.

The district court issued two more orders which broadened the initial order. On April 26, 1989, the court entered an order, which is reprinted in the Appendix at 35a - 46a, *infra*, to broaden the preliminary injunction to enjoin the 33 attorneys general who are petitioners herein and to allow ten foreign airlines to intervene as plaintiffs. An appeal from this order was filed by the 33 attorneys general and the Texas Attorney General (case number 89-1509). The January 30, 1989 order and the April 26, 1989, order are reported at 712 F.Supp. 99.

On May 26, 1989, the court signed a further order which is reprinted in the Appendix at 48a, *infra*. It expanded the injunction to bring Pan American World Airways within its protection and granted Pan Am the right to intervene as a plaintiff. An appeal from this order, was filed by the 33 attorneys general and the Texas Attorney General (case number 89-1610). The Court of

Appeals for the Fifth Circuit consolidated these three appeals for hearing and decision.

On June 1, 1990, the district court, in response to plaintiffs' motion for judgment on the pleadings, or for summary judgment, and for entry of final judgment, and based upon the decision of the Fifth Circuit, signed an order of final judgment and permanent injunction against the 33 states and Texas. This order is reprinted in the Appendix at 48a - 51a, *infra*.

JURISDICTION

The airlines originally invoked jurisdiction of the federal courts under 28 U.S.C. section 1331 and 1337. The Court of Appeals for the Fifth Circuit, on April 3, 1990, entered a judgment and an opinion affirming the district court's preliminary injunction. (Appendix at 1a - 30a, *infra*.) No petition for rehearing was sought. On June 20, 1990, Justice White ordered that the time for the filing of a petition for writ of certiorari be extended to and including August 1, 1990. This Court has jurisdiction to review the judgment of the Fifth Circuit pursuant to 28 U.S.C. section 1254(1).

STATUTES INVOLVED

Federal Aviation Act section 105(a)(1), 49 U.S.C. section 1305(a)(1) [in pertinent part]. Federal preemption.

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Federal Aviation Act section 411(a), 49 U.S.C. section 1381(a). Methods of competition.

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Federal Aviation Act section 1106, 49 U.S.C. section 1506. Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

State False Advertising Laws.

The relevant provisions of several state false and deceptive advertising laws are reprinted in the Appendix at 52a - 59a, *infra*. In general, such state laws prohibit false or misleading advertising or deceptive or unfair practices in the conduct of any trade or commerce. None of them specifically refers to airline advertising.

STATEMENT OF THE CASE

This case presents this Court with the opportunity to settle a serious conflict between the Fifth Circuit's decision and previous decisions of several other federal courts, including the District of Columbia Circuit and the

Ninth Circuit, and state courts. The Fifth Circuit's decision fundamentally affects the sovereignty of the states by denying them the right to enforce, under their police power authority, their false advertising and unfair and deceptive business practices laws against false advertisements placed by airlines, and by denying them the right to ensure that citizens of their states receive truthful, non-misleading advertisements.

On January 23, 1989, Trans World Airlines, Inc., Continental Airlines, Inc. and British Airways, PLC commenced this action in the United States District Court for the Western District of Texas. The only named defendant was the Attorney General of Texas, Jim Mattox. But the complaint sought an injunction to prohibit him *and* others from enforcing the Texas Deceptive Trade Practices Act, *or* any other state law, against airline advertising. This injunction would have effectively insulated these three airlines from prosecution for false or deceptive advertising by the State of Texas or any other state. The complaint also sought injunctive relief which would "preliminarily and permanently enjoin" the taking of any action against plaintiffs pursuant to any "state law . . . as they purport to regulate plaintiffs' rates, routes or services, or plaintiffs' marketing or plaintiffs' advertising of their rates, routes and services; . . . ." (Complaint, Prayer, paragraph (e), Docket #1, Record on Appeal, Vol. 1, pg. 144.)[3/] A hearing on plaintiffs' request for a temporary restraining order ("TRO") was set for January 27, 1989.

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3. Throughout references to items in the Record on Appeal to the Fifth Circuit will be by docket item number ("Dkt #"), followed by reference to either the Record on Appeal ("RA"), the First Supplemental Record on Appeal ("1st Supp") or the Second Supplemental Record on Appeal ("2nd Supp") and where possible, the appropriate volume number and page cite.

Because plaintiffs' prayer could be read as a request for an order restricting all states from enforcing their own false advertising laws, 33 states filed a five page "Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Request to Extend Date for Hearing on Temporary Restraining Order." ("Motion of Specially Appearing States;" Dkt #13, RA, Vol. 1, 39-46.) The 33 attorneys general filed this Motion, "without admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them . . . ." The 33 states asked that the three airlines' request for a TRO be denied because it "could affect the sovereign rights of states which have neither been served nor named as defendants in the instant action," and requested "Time to decide in orderly fashion how and whether to respond . . . ." (*Id.*, at 41-42.)

At the TRO hearing, Attorney General Robert T. Stephan of Kansas specially appeared on behalf of himself and the State of Kansas to argue the lack of the court's jurisdiction as set forth in the Motion of Specially Appearing States. Three days later the district court granted the airlines a preliminary injunction and held that "it is probable that: Plaintiffs will prevail in establishing their claims that any state regulation of advertising of the Plaintiffs' rates, routes, and services had been preempted by the Federal Government." The order enjoined Attorney General Mattox and all other persons acting in concert or participation with him, *and* "all other persons having actual knowledge of" the injunction, from:

> ". . . initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§ 17.41 et seq., *or any other provision of state law,* which would seek to regulate or restrict any aspect of the individually named plaintiff

airlines' air fare advertising or the operations involving their rates, routes and/or services." (Appendix at 32a - 33a; emphasis added.)

Because it was unclear whether the preliminary injunction prohibited states other than Texas from enforcing their own state laws, Attorney General Stephan, acting for himself alone, sought clarification. (Dkt #24, RA, Vol. 1 at 1-2.) Plaintiffs' counsel confirmed that the attorneys' general apprehension that the airlines were attempting to bind them by their request for a TRO was not misplaced when he "unambiguously advised the Court that plaintiffs were seeking a broader injunction than one just against defendant Mattox by himself." ("Plaintiffs' Opposition to Robert Stephan's Motion to Clarify and Substitute Order;" Dkt #27, 1st Supp., Vol. 2 at 386.)

On February 27, 1989, the court issued an order clarifying that the preliminary injunction "does not apply to any state, . . . other than Texas, nor to any law other than the laws of the State of Texas." (Appendix at 34a.) Not to be deterred in their attempt to have a federal district court exercise jurisdiction over attorneys general not within the territorial jurisdiction of the court, on March 16, 1989, the plaintiffs filed a motion to broaden the preliminary injunction to prohibit the 33 states from initiating enforcement actions against them. (Dkt #33, 1st Supp, Vol. 2, at 311-313.) On March 29, 1989, ten additional foreign airlines[4] filed a motion for leave to intervene. (Dkt #44, 1st Supp, Vol. 1 at 154-233.) Except for serving

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4. The airlines which moved to, and were eventually allowed to, intervene as plaintiffs were: Air Canada, Compagnie Nationale Air France, Alitalia-Linee Aeree Italiane, S.p.A., El Al Israel Airlines, Ltd., Finnair, Lufthansa German Airlines, Japan Air Lines Company, Ltd., Qantas Airways Ltd., Scandinavian Airlines System and Viacao Aerea Rio-Grandense (VARIG).

Attorney General Stephan, and, of course, Attorney General Mattox, plaintiffs did not serve these motions on any of the other 33 attorneys general who the airlines sought to have bound by the expanded order.

Attorney General Stephan, again acting for himself alone, filed a response to the airlines' motion, denying that the district court had subject matter or personal jurisdiction over him. (Dkt #50, 1st Supp., Vol. 1, 108-131.) The other petitioners herein did not appear or file any documents with the court in response to the airlines' motions, since none was a party nor had any been served and since the district court had only approximately two weeks earlier modified its order to make it clear that the injunction only applied to the Attorney General of Texas and the application of Texas law.

On April 26, 1989, the district court: (1) granted the ten foreign airlines' motion to intervene; (2) granted plaintiffs, pursuant to Federal Rules of Civil Procedure ("FRCP") 19, permission to amend their complaint to add as defendants the 33 attorneys general who had filed the Motion of Specially Appearing States; and, (3) reversing its Order of February 27, 1989, ordered that the preliminary injunction be broadened to include the 33 attorneys general. (Appendix at 35a - 46a.)

On May 26, 1989, the district court consolidated the case of *Texas v. Pan American World Airways, Inc.*, with the action originally filed by TWA, et al., granted Pan Am's motion to intervene in this proceeding, and again expanded the preliminary injunction, this time to include Pan Am within its scope. (Appendix at 47a.) The 33 attorneys general were each served with the airlines' amended complaint. Motions to dismiss were filed claiming, *inter alia*, that the court lacked both personal jurisdiction over these attorneys general and subject matter

jurisdiction over the claims asserted by the airlines against the 33 attorneys general. The district court never held a hearing on these motions but stayed all proceedings pending a ruling by the Fifth Circuit.

On appeal, the Fifth Circuit, which had consolidated the attorneys' general appeals from the district court orders of January 30, April 26, and May 26, 1989, affirmed the district court's issuance of the preliminary injunction because "[49 U.S.C.] §1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising, ..." (897 F.2d at 783; Appendix at 19a.) Unlike the district court, however, the Fifth Circuit did not hold that the 33 attorneys general should be joined in the action under FRCP 19 but rather held "that the thirty-three attorneys general became *de facto* intervenors when the Attorney General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf." (897 F.2d at 786; Appendix at 27a.) Thus, the Court of Appeals found that the district court had personal jurisdiction over the 33 attorneys general so that the injunctive relief could be expanded to cover them. The Fifth Circuit did not, however, make any ruling regarding the claim of the attorneys general that the district court lacked subject matter jurisdiction over each of the airline plaintiffs' claims against each of the attorneys general.

On June 1, 1990, in response to "Plaintiffs' Motion For Judgment on the Pleadings, or For Summary Judgment, and For Entry of Final Judgment," and without holding a hearing on the states' motions to dismiss and jurisdictional challenges, but based upon the decision of the Fifth Circuit, the district court signed an order of final judgment and permanent injunction against the 33 states and Texas. (Appendix at 48a - 51a.) A notice of appeal has been filed by the 33 states and Texas from this

order.[5] This order is virtually identical to the preliminary injunction upheld by the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT, THE DISTRICT OF COLUMBIA AND NINTH CIRCUITS, LOWER FEDERAL COURTS AND STATE APPELLATE COURTS, AS TO WHETHER CONGRESS INTENDED THE AIRLINE DEREGULATION ACT TO PREEMPT STATES FROM ENFORCING THEIR FALSE ADVERTISING LAWS AGAINST AIRLINES

The Fifth Circuit, in upholding the decision of the district court that the states are preempted from enforcing their deceptive advertising laws against false airline advertisements, has reached a conclusion which significantly diverges from decisions regarding the preemptive effect of the Federal Aviation Act ("FAA") reached by this Court (*see Nader v. Allegheny Airlines*, 426 U.S. 290 (1976)), Courts of Appeal in the D.C. and Ninth Circuits (*see Alaska, et al. v. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989) and *Air Transport Ass'n v. P.U.C. of California*, 833 F.2d 200 (9th Cir. 1987) *cert. denied* 108 S.Ct. 2904 (1988)), and district courts in the Second Circuit

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5. This appeal has been assigned Case Number 90 - 8387 by the Fifth Circuit. While that appeal has not yet been decided, and is therefore not the subject of this petition, it is nevertheless appropriate to grant this petition for certiorari now because the Fifth Circuit, in the decision at issue here, essentially decided the case on the merits and the Fifth Circuit panel which hears the new appeal is unlikely to change the result as this decision may be held to be the law of the case. *Adams-Lundy v. Association of Professional Flight Attendants*, 792 F.2d 1368, 1371 (5th Cir. 1986).

(*New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y. 1989)), the Third Circuit (*Brunwasser v. Trans World Airlines, Inc.*, 541 F.Supp. 1338 (W.D. PA. 1982)), the Ninth Circuit (*California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal. 1989)), and the Tenth Circuit (*Kansas v. Trans World Airlines*, 730 F.Supp. 366 (D.Kan. 1990)), as well as appellate courts in California (*People v. Western Airlines, Inc.*, 155 Cal. App.3d 597 (1984), *cert. denied* 469 U.S. 1132 (1985)) and New York (*State by Lefkowitz v. Scottish-American Ass'n, Inc.*, 52 A.D.2d 528 (1st Dept. 1976)).

When this Court faced the issue of the preemptive effect of the FAA in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), the Airline Deregulation Act ("ADA") had not yet been passed, and the preemption language of section 105 (a)(1) (14 U.S.C. section 1305 (a)(1)) therefore could not be reviewed. Yet, notwithstanding the existence of section 411(a),[6] this Court found no Congressional intent expressed in the FAA, of a desire to preempt other common law and statutory enactments from being used to regulate deceptive practices by airlines. Except for the decision of the Fifth Circuit, the decisions cited above of courts which have considered section 105 (a)(1) continue to find no Congressional intent to preempt the states' ability to enforce state regulation of the type here in question.[7]

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6. Section 411 (a) (49 U.S.C. §1381 (a)) grants jurisdiction to the federal government to regulate deceptive practices by airlines.

7. The cases cited in note 2, *supra*, and *People v. Western Airlines, supra*, 155 Cal.App.3d 597, each found no express preemption in the ADA and that causes of action based upon state consumer protection laws and common law rights survived the adoption of §105 (a)(1). In *Alaska, et al. v. DOT, supra*, 868 F.2d 441, the D.C. Circuit was faced with the question of whether

This conflict regarding the proper scope of section 105 is of critical importance to: (1) the states' exercise of their sovereign rights under our federal system to create and enforce their own laws, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982); (2) the states' interest in a properly functioning federalism where their long-standing exercises of police power are preempted only when Congress makes its intent clear and manifest, *California v. ARC America Corp.*, ___U.S.___, 109 S.Ct. 1661, 1665 (1989) and *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985); (3) the states' substantial interest in maintaining honest marketplaces, *Snapp*, *supra*; and, (4) the states' traditional responsibility to protect their citizens from false and misleading advertising used in their states by sellers, who are attempting to sell goods and services in their states.

Even if the Court were to deny this petition, thereby allowing the Fifth Circuit decision to stand, that would likely not be the end of the issue of preemption of state false advertising laws under the ADA. Sixteen states are not covered by the injunction affirmed by the Fifth Circuit. Numerous airlines are not parties to that litigation and are not covered by the injunction.

Furthermore, thousands of travel agents, trip promoters and airline ticket consolidators who advertise airfares were not parties to the case and are not covered by the injunction. Under the logic of the Fifth Circuit's ruling, some in this latter group may argue that the Fifth Circuit's decision is not confined to deceptive advertising

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the states had standing to challenge action taken under the FAA by the DOT. That court ruled the states' claim of injury by the challenged 1988 DOT action was redressable by it and that the states had standing. Had the D.C. Circuit found that the ADA preempted the states, it could not have so concluded.

by airlines but also preempts state regulation of travel agents, trip promoters, and ticket consolidators who engage in false or deceptive advertising for airline travel. Absent a ruling from this Court, litigation is likely to arise from the states' continued efforts to enforce their laws against these entities. A clear ruling on an issue over which the lower courts are split and which will otherwise likely arise in the future will prevent extensive further litigation on the question of the preemptive effect of section 105.

II.
THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE FEDERAL AVIATION ACT OF 1958 AND THE AIRLINE DEREGULATION ACT PREEMPT STATE ENFORCEMENT OF STATE FALSE ADVERTISING AND DECEPTIVE PRACTICES LAWS AGAINST FALSE ADVERTISING BY AIRLINES

Petitioners herein adopt and incorporate by reference the detailed argument set forth in the Petition for Writ of Certiorari filed in this matter by the Texas Attorney General which conclusively demonstrates that the Fifth Circuit erred in holding that Congress expressed an intent by adopting section 105 to preempt state enforcement of state false advertising and deceptive practices acts against false advertising by airlines.

Federal regulation of deceptive advertising emanates from section 411 of the FAA (49 U.S.C. § 1381). As first adopted in 1938, it was patterned after section 5 of the Federal Trade Commission Act, 15 U.S.C. section 45. *(See, Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963).) The FTC Act's section 5 has been historically interpreted as coexisting with state laws regulating false advertising and deceptive business practices. *(See, e.g., American Financial Services v. FTC*,

767 F.2d 957 (D.C. Cir. 1985).) Likewise, from its inception section 411 has been read to supplement, and not preempt, state statutory and common law causes of action used to challenge airline deceptive practices. *(See, e.g., Brunwasser v. Trans World Airlines, Inc., supra*, 541 F.Supp. 1338; *People v. Western Airlines, Inc., supra*, 155 Cal. App.3d 597; and, *State by Lefkowitz v. Scottish-American Ass'n, Inc., supra*, 52 A.D.2d 528.) Further, this Court has interpreted the section 1106 "savings clause" of the FAA (49 U.S.C. § 1506), as preserving state causes of action which, on the federal level could be challenged under section 411. (*See, Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976).)

Section 105 (a)(1) of the FAA (49 U.S.C. § 1305 (a)(1)), as added by the Airline Deregulation Act of 1978, only preempts state laws "relating to rates, routes, or services" of interstate airlines. The Congressional history relating to the addition of section 105 to the FAA makes it clear that Congress' intent was to prevent states from adopting utility type regulations which would require airlines to charge certain prices for certain flights, fly specified routes and provide specified services -- i.e., overbooking compensation, liability for damaged luggage, and charter services. *(See, e.g.,* H.R. Rep. No. 793, 98th Cong., reprinted in 1984 U.S. Code Cong. & Admin. News 2857, 2860; and H.R. Rep. No. 1211, 95th Cong. reprinted in 1978 U.S. Code Cong. & Admin. News 3737, 3752 (the purpose of § 105 is such that "no state may regulate carrier's routes, rates or services").)

Nowhere in any Congressional report or in the legislation itself is there mention of the need to change the regulation of deceptive advertising from an activity which permits both a state and federal presence to one which excludes all but a federal presence. By talismanicly equating the words "relating to" found in section 105 with

the interpretation given the words "*relate to* any employee benefit plan" as used in the Employee Retirement Income Security Act of 1974 ("ERISA"), the Fifth Circuit erroneously found that Congress intended to preempt state false advertising laws. In doing so the Fifth Circuit ignored the clear holding of this Court that the meaning of these words as used in ERISA is virtually *sui generis*. (*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).)

The Fifth Circuit decision also fails to meet the standard this Court and other federal courts have enunciated repeatedly, that in areas, such as consumer protection, where there is a long-standing traditional exercise of the states' police powers, preemption can be found only where Congress has made its intent clear and manifest. (*See, e.g., California v. ARC America Corp., supra,* 109 S.Ct. 1661, 1665; *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Automobile Importers of America, et al. v. State of Minnesota*, 871 F.2d 717 (8th Cir. 1989); and, *Chrysler Corp. v. Texas Motor Vehicle Comm.*, 755 F.2d 1192, 1205 (5th Cir. 1985).) Thus to find preemption in a case such as this requires an even a clearer statement from Congress than is required in a typical preemption case.

It is at best difficult to find in either the FAA or the ADA a "clear and manifest" statement of Congress' intent to preempt states from enforcing their false advertising laws against deceptive advertisements by airlines. Any relationship between airlines' "rates, routes or services" and the states' enforcement of their false advertising and deceptive practices laws against false advertising by airlines is too remote and indirect to fall

within Congress' intent to prevent the adoption of utility type regulation by the states when it adopted section 105. This Court should grant the petition in order to reverse the Fifth Circuit's erroneous finding of preemption.

III.

THIS COURT SHOULD GRANT CERTIORARI AND REVERSE THE FIFTH CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT ORDER BECAUSE IT IS SO BROAD THAT IT EFFECTIVELY CREATES NATIONWIDE JURISDICTION FOR THE FIRST DISTRICT COURT TO RULE UPON AN ISSUE

In the matter *sub judice* the district court thoroughly ignored and transcended the established limits of its jurisdiction. Its order enjoining the states from applying their deceptive advertising laws to deceptive airline advertisements does not apply just to the parties before it, or to those "acting in concert" with them, but to "all other persons having actual knowledge of this Order, . . ." (712 F.Supp. at 101-102.) This order, which the Fifth Circuit affirmed, in effect, makes the District Court for the Western District of Texas the final arbiter on the question of section 105's scope. How, for instance, can one of the 16 attorneys general who is not a party to this action, but who knows about the injunction, in good faith, and without threat of being in contempt of this order, bring an action against an airline plaintiff which deceptively advertises in his or her state? No federal district court should have the power to bind all fifty states simply because it broadly decides an issue.

This Court, in a different context, has held that when the government is a party to an action, principles should not be adopted which retard the future development of the law or which prevent more than one

district court from ruling on the same issue. (*United States v. Mendoza*, 464 U.S. 154, 160, 163 (1984).) The principles underlying this policy are even more critical when applied to the usurpation of authority by a federal court which issues an order precluding all 50 state governments from enforcing their own laws. That a single district court should not have such authority is further evidenced by the fact that three other district courts ruled, unlike the district court here, that there is no express preemption of state false advertising laws by the Airline Deregulation Act.[8/]

The order affirmed by the Fifth Circuit in effect chokes off the possibility of further review and differing decisions by other district courts, courts of appeals or state courts. If left in place this order will retard further development of the law.[9/] This Court should grant the petition to reverse the decision of the Fifth Circuit and

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8. *See*, note 2, *supra*.

9. The airline plaintiffs are already using the Fifth Circuit decision and the district court's final order to stifle further development. For example, in *New York v. TWA*, *supra*, 728 F.Supp. 162, one of the actions taken by the district court was to dismiss Pan American World Airways' preemption claim in an action it filed against New York which was identical to the action TWA filed in the matter which is the subject of this petition. (*Pan American World Airways, Inc. v. Robert Abrams, as Attorney General of New York*, consolidated for decision in 728 F. Supp. 162.) Pan Am appealed to the Second Circuit; the matter was fully briefed and set for oral argument on April 20, 1990. With the issuance of the Fifth Circuit's decision on April 3, 1990, Pan Am withdrew its appeal on April 19,1990, thereby thwarting the possibility of conflicting circuit court decision. Likewise, based upon the district court's final order herein, TWA asked the state courts in California and Kansas to dismiss those actions; the California court has indicated it will grant TWA's request; argument has not yet been heard by the Kansas court. In New York, the state court dismissed the state's action based on the decision of the Fifth Circuit.

declare that the district court exceeded the scope of its limited jurisdiction in issuing an order which binds "all other persons having knowledge of this Order."

IV.
THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER EACH OF THE AIRLINES' CLAIMS AGAINST THE ATTORNEYS GENERAL

A. The Airlines' Complaint Does Not Allege the Necessary Case Or Controversy As To Each Attorney General Defendant So As To Vest Jurisdiction Over Each Of Them In the Federal District Court For the Western District Of Texas.

A review of the airlines' amended complaint shows that as to all of the attorneys general, save the attorneys general of California, Kansas, Massachusetts, New York, Texas and Washington, none of the plaintiffs has alleged that any of the other 28 attorneys general have threatened or initiated any legal action under any of their respective consumer protection statutes against any of the airline plaintiffs. In fact, other than alleging that these other state attorneys general belong to the National Association of Attorneys General ("NAAG"), none of the airlines can allege that any of these 28 attorneys general have done anything which evidences a concrete and definite controversy as between the airlines and these attorneys general because there simply is no case or controversy as between the airlines and these attorneys general. As such, the airlines' complaint does not meet the requirements of

Article III, section 2, necessary to give a federal district court jurisdiction.[10/]

Two benchmark decisions of this Court which apply the case or controversy standard were ignored by the Fifth Circuit, although they should have been dispositive. In *United Public Works v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) plaintiffs sought declaratory and injunctive relief to preclude enforcement of a provision of the Hatch Act. Only one of the plaintiffs had violated the challenged provision. As to the others, this Court held their various constitutional claims were simply not justiciable and underscored its insistence that "[f]or adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite." In denying the other plaintiffs' claims, this Court stated that "the general threat of possible interference with constitutional rights if specified things are done by appellants, does not make a justiciable case or controversy." (*Id.*, at 89.)

The same constitutional theme of the need for justiciability permeates *International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 22 (1954). This Court, in directing that the complaint be dismissed for lack of a case or controversy, anticipated the airlines' present "case" herein:

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10. Although the airlines also claim that this action falls within the Declaratory Judgment Act, 28 U.S.C. § 2201, it must be remembered that this act does not, in and of itself, provide a basis for federal question jurisdiction. It enlarged the range of remedies available to federal courts; it did not extend their jurisdictional scope. *Skelly Oil Company v. Phillips Petroleum Company*, 339 U.S. 667, 671 (1950).

> "Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; . . . Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case, involves too remote and abstract an inquiry for the proper exercise of the judicial function." (*Id.*, at 223-24.)

No justiciable case or controversy has been established by each of the plaintiff airlines in their complaint vis-a-vis each of the attorneys general. As to all states and the foreign airline intervenors, save Lufthansa, there has been no contact regarding specific advertisements of those airlines nor is any alleged in the amended complaint. As to the 28 state attorneys general, the lack of case or controversy is unmistakably clear. Plaintiffs do not, and cannot, allege that any of them have filed or threatened to file enforcement actions against any of the airlines based upon the manner in which they advertise. This Court should grant the petition to reverse the decision of the Fifth Circuit and reaffirm the fundamental constitutional bounds of federal court jurisdiction: no jurisdiction exists absent subject matter jurisdiction.

B. There Is No Subject Matter Jurisdiction Over The Claims Each Airline Has Made Against Each Attorney General.

Although the Fifth Circuit recognized that subject matter jurisdiction cannot be waived, the decision of that

court, as well as the decision of the district court, fails to address the petitioners' claim that the district court lacked subject matter jurisdiction to hear the airlines' complaint against the attorneys general. In previously establishing the need of a finding of subject matter jurisdiction, this Court in *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178 (1936), stated:

> "It is incumbent upon the plaintiff properly to allege the jurisdictional facts . . . [J]urisdictional facts [must] be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of the evidence." (*Id.*, at 182, 189.)

The attorneys general have put into issue all of the airlines' material allegations as they relate to subject matter jurisdiction.[11/] Since a factual attack on the court's

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11. In order to contest the basis for the district court to exercise personal jurisdiction over these attorneys general and to place in issue the question of subject matter jurisdiction over the claims raised against these attorneys general, a number of attorneys general and assistant attorneys general filed, in conjunction with motions to dismiss the airlines' amended complaint (docket file numbers 161-164), affidavits with the district court refuting such charges. Copies of these affidavits are attached to the petitioners' Reply Brief filed with the Fifth Circuit on September 5, 1989 in the Appendix thereto at Tabs 3-10. The affidavits deny the allegations that Attorney General Mattox has been acting as the agent of any other attorney general, that any of these attorneys general seek to enforce the NAAG Guidelines rather than their own state laws, that these states have interpreted any state law or tried to enforce any state law other than their own, that these attorneys general have acted "in concert" with Attorney General Mattox or one another to enforce the NAAG Guidelines or the laws of any state, that the attorneys general have

subject matter jurisdiction "challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, . . . matters outside the pleadings, such as testimony and affidavits, are considered." *(Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).) When dealing with a "factual attack" under FRCP 12 (b)(1), the "plaintiff bears the burden of proof that jurisdiction does in fact exist." (*Id.*, citations deleted.) In this matter, the airlines cannot establish that subject matter jurisdiction exists vis-a-vis all of their claims. The alleged "concerted" conduct of the attorneys general, the underpinning of plaintiffs' entire case, has been thrown into serious question by the filed affidavits.

It was, thus, incumbent upon the district court and the Fifth Circuit to require plaintiffs to bear the burden of proof to show that jurisdiction exists. Until they were able to do so, the district court should not have expanded the injunction to include the 33 attorneys general within its scope, and should not have granted the ten foreign airline plaintiffs the right to intervene.

Thus, the Fifth Circuit without making a finding of subject matter jurisdiction as to each claim by each plaintiff airline against each defendant attorney general, improperly affirmed the district court's orders and impermissibly extended the authority of the federal district

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acted "in concert" with Attorney General Mattox to enforce Texas law, and as appropriate deny that the offices of these attorneys general have "threatened," "pressured," or "coerced" any of the plaintiffs to comply with the NAAG Guidelines. They further affirmatively allege that they have not done business in Texas, have not consented to personal jurisdiction in Texas, have had no contacts with Texas regarding the subject matter of this lawsuit and have not caused any harm to anyone in Texas.

court.[12] This Court should make it clear that on this threshold issue of fundamental constitutional dimensions the airlines cannot overcome this impediment because without subject matter jurisdiction no judgment rendered by a federal court can stand.

V.

THE DECISION BELOW THAT THE THIRTY-THREE ATTORNEYS GENERAL BECAME DE FACTO INTERVENORS IS SUPPORTED BY NEITHER THE FACTS NOR THE LAW AND IS AN IMPROPER EXTENSION OF FEDERAL COURT JURISDICTION

Although the Fifth Circuit ruled that the 33 attorneys general subjected themselves to the personal jurisdiction of the district court, it cites no authority for this proposition. To allow a district court to hale 33 attorneys general who are outside of the court's territorial limits before it, so that it can rule on the applicability of the laws of 34 different states in one fell swoop, and thereby have "the ability to . . . render a meaningful decision over the issue of whether federal law preempts state action in the matter of airline advertising" (712

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12. The result of this lack of a ruling on the subject matter jurisdiction question produces the following anomaly: plaintiffs El Al Israel Airlines and Finnair can apparently set forth, in the United States District Court for the Western District of Texas, a valid claim against the attorneys general of Nebraska or Iowa when neither airline advertises in nor flies into or out of Nebraska or Iowa and neither airline has ever been contacted by the attorney general of either state. Yet there would be no subject matter jurisdiction if those attorneys general sued El Al or Finnair in the Western District of Texas claiming they violated Nebraska's or Iowa's deceptive advertising laws by publishing deceptive advertisements in the Western District of Texas, but not in Nebraska or Iowa.

F.Supp. at 105; Appendix at 42a) is not a valid reason to ignore the jurisdictional rule requiring properly exercised personal jurisdiction before a court may enter a valid order.[13] No authority exists to support such an unwarranted expansion of federal court jurisdiction, and this Court should grant the petition to reverse the finding of personal jurisdiction and ensure that other federal courts will not likewise try to expand their jurisdiction beyond constitutionally established limits.

As this Court recently pointed out in *Burnham v. Superior Court of California*, ____ U.S. ___, 58 U.S.L.W. 4629 (5-29-90), state courts can exercise jurisdiction over *absent* defendants "only with respect to suits arising out of the absent defendant's contacts with the state" and "the judgment of a court lacking jurisdiction is void." (*Id.*, at 4630.)[14] A federal district court has no authority to bind a person over whom it has no jurisdiction. (*Hansen v. Denckla*, 357 U.S. 235 (1958).) "Absent specific congressional authority, a federal district court has no personal jurisdiction over a defendant who cannot be reached by the long-arm statute of the state in which the district court sits." (*Point Landing, Inc. v. Omni Capitol Int'l LTD.*, 795 F.2d 415, 427 (5th Cir. 1986) (per curiam) (en banc) *aff'd sub nom. Omni Capitol Int'l, LTD v. Rudolf Wolf and Co., LTD.*, 484 U.S. 97 (1987).)

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13. In fact, the district court decision and the Fifth Circuit decision do not even agree as to the basis for the exercise of personal jurisdiction over the 33 attorneys general. *See*, note 16, *infra*.

14. Although *Burnham* involved the question of whether due process allowed a state court to exercise jurisdiction over an out-of-state defendant who was served while within the geographical boundaries of the state, the above statements hold equally true to the jurisdictional range of a federal district court.

Burnham discusses the traditional bases for exercising personal jurisdiction over a non-resident defendant who is not amenable to physical service within the territorial jurisdictional limits of the court: minimum contacts with the would-be forum state or the doing of acts, directly or by an agent, in the would-be forum state which form the basis of the lawsuit. Under these tests it is clear that none of the 33 attorneys general is subject to service of process under FRCP 4 or the Texas Long-Arm statute (Texas Rule of Civil Procedure 108).[15/]

The prerequisite set forth in FRCP 19 to the non-voluntary joinder of a non-party to an action is that the person sought to be joined be "a person who is subject to service of process." Since none of the 33 attorneys general is subject to service within the territorial boundaries of the District Court for the Western District of Texas, petitioners assume that the Fifth Circuit rejected the district court's use of Rule 19 joinder to assert jurisdiction over them[16/] and created its own fiction of *de facto* intervention and waiver of objections to personal jurisdiction as its basis for exercising jurisdiction over these petitioners. But this purported basis is equally illusory.

Petitioners admit that lack of personal jurisdiction can be waived, but the record is clear that in this matter it has not been. The cases cited by the Fifth Circuit do not support that court's position that the claim has been

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15. See note 11, *supra*.

16. The district court had rejected the airlines' "assertions that the additional Attorneys General be *deemed* intervenors," and held instead "that the proper method of joinder is through Federal Rules of Civil Procedure 19." (712 F.Supp. at 105; Appendix at 42a.)

waived. For example, in *Grammenos v. Lemos,* 457 F.2d 1067, 1070 (2nd Cir. 1972), the court established that before one waives the right to object to personal jurisdiction, one must (1) enter a case, (2) make no objection to jurisdiction, and (3) ask the court to act on its behalf in some substantive way.

In every document filed by any of the 33 attorneys general in this matter, *in personam* and subject matter jurisdiction have always been contested. A review of the record shows the 33 attorneys general have never evidenced an intent to intervene, have not "participated" in this action in a way which would waive their jurisdictional objections and have never failed to assert such jurisdictional objections. Thus, the attorneys general did not waive their right to raise these objections.

The Fifth Circuit implies that the 33 attorneys general should have done nothing. (897 F.2d at 786; Appendix at 26a.) Yet, all the attorneys general did was attempt to protect their ability to enforce their state laws by filing a Motion of Specially Appearing States contesting the personal jurisdiction and subject matter jurisdiction of the district court and asking the court not to enjoin them,[17] or in the alternative, for more time to respond.

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17. A review of the complaint shows that the airlines base their claims on the fact that various state attorneys general belong to NAAG which, in an attempt to set forth an opinion regarding what types of advertisements would be safe from prosecution under state false advertising and deceptive and unfair practices statutes, adopted airline advertising guidelines. Thus the complaint alleges that the attorneys general including Texas Attorney General Mattox, supposedly acted illegally in active concert and participation with one another, "that Texas and other states are trying to force plaintiffs to adhere" to their state laws and that "the threatened application of Texas' and other states' laws to plaintiffs" is unlawful. (Dkt #1, RA, Vol 1, 119-145, at

Attorney General Stephan "specially" appeared at the oral argument on the airlines' motion for TRO to represent his position that the court lacked personal jurisdiction over the attorneys general and subject matter jurisdiction over the airlines' claims against these attorneys general. He did not appear as legal counsel for the other attorneys general nor did he claim any legal authority to enter an appearance for the other states as *their* counsel.

The original district court order included the broad and ambiguous language quoted at pages 7-8, *supra*, Appendix at 32a -33a. Whether it included within its sweep other attorneys general and laws other than those of the State of Texas was uncertain.[18] State attorneys general above all others are sworn to uphold the law and are committed to complying with a court order; yet they are also required to enforce the laws of their individual states. Thus, it was only proper for Attorney General Stephan to seek a clarification of the order.

142.) The prayer asks for a declaration "that implementation or enforcement of . . . Tex. Bus. & Comm. Code §§17.41 et seq. *or any other state law*" (emphasis added) be declared unconstitutional on various grounds. Similarly, the plaintiffs' memorandum in support of their motion for TRO asked the court to "issue a temporary restraining order to prohibit defendant . . . or anyone in concert with him from taking any action to enforce or otherwise implement the Guidelines through state law" (Dkt #3, RA, Vol 3, at 57). Thus it was only reasonable for the other attorneys general who are members of NAAG to be concerned that the plaintiffs meant to deny them their ability to enforce their individual state laws even though plaintiffs had not named or served them with the complaint. *See, also,* p. 8, *supra.*

18. As indicated in note 17, *supra,* and at page 8, *supra,* it became clear during the airlines' argument at the TRO hearing that the concern of the attorneys general who were not named as parties was well founded.

It is clear his Motion to Clarify, which was filed solely on his own behalf, contested both the court's subject matter jurisdiction and its personal jurisdiction over him. (Dkt #24, RA, Vol. 1, at 1-2.) If the Fifth Circuit is saying that 33 attorneys general can be held to have intervened because one of them sought clarification of an order rather than risk enforcing the laws of his state in a way which might put him in contempt of that order, then the rules pertaining to intervention have been expanded in a way this Court should not allow.[19]

After reviewing what actually happened in this case, petitioners respectfully submit that it is hard to fathom the legal basis for the Fifth Circuit's statement that, "It appears to us that the thirty-three attorneys general became *de facto* intervenors . . ." (897 F.2d at 786; Appendix at 27a.) The 33 attorneys general did not voluntarily inject themselves into this controversy. They simply took those few steps they believed necessary to protect their states' sovereignty insofar as it was threatened by a TRO request that sought to enjoin them, without notice, from enforcing their respective state laws. To require them to do nothing, as the Fifth Circuit suggests, places them in a "Catch-22" situation - if the injunction is issued they may be bound by it because a challenge to the court's jurisdiction gives the court jurisdiction.

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19. The attorneys general assume the Fifth Circuit cannot be saying that because Attorney General Stephan who was served with the airlines' motion to expand the injunction, responded to it by contesting the court's personal and subject matter jurisdiction over him, 33 attorneys general have "intervened" in this action. In fact, as pointed out *supra*, pages 9 - 10, after each of the 33 attorneys general were served with the amended complaint, motions to dismiss were filed which contested both the court's subject matter jurisdiction and its personal jurisdiction over them. Certainly, filing motions to dismiss, as contemplated by FRCP 12, cannot be the basis for finding intervention.

This Court should grant the petition to rule that a finding of personal jurisdiction under these circumstances is an affront to our federalist system, and a denial of due process which will not be tolerated. If the Fifth Circuit's decision is allowed to stand, the attorneys general of the various states will, time and again, find themselves subject to the orders of courts which have no personal jurisdiction over them, issued in actions in which they are not named parties, because a plaintiff has named a single attorney general as a defendant and challenged a law of the named attorney general's state. This Court must not allow such usurpation of state authority to stand.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

DATED: August 1, 1990

Respectfully submitted,

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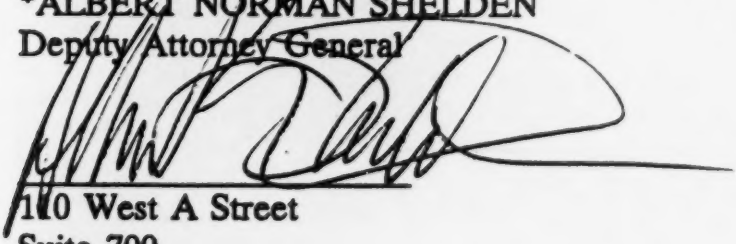

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TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

v.

Jim MATTOX, Attorney General of the State of Texas, Defendant-Appellant.

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

v.

Jim MATTOX, Attorney General of the State of Texas, et al., Defendants-Appellants.

TRANS WORLD AIRLINES, INC., et al., Plaintiffs-Appellees,

Pan American World Airways, Intervening-Plaintiff-Appellee,

v.

Jim MATTOX, Attorney General of the State of Texas, et al., Defendants-Appellants

Nos. 89-1142, 89-1509 and 89-1610.

United States Court of Appeals, Fifth Circuit.

April 3, 1990.

Appeals from the United States District Court for the Western District of Texas.

Before LIVELY,* JOLLY and HIGGINBOTHAM, Circuit Judges.

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* Circuit Judge of the Sixth Circuit, sitting by designation.

LIVELY, Circuit Judge.

The dispositive question in these consolidated appeals is whether state laws proscribing deceptive advertising are preempted by federal law when the state attempts to enforce such laws against the advertising of fares by interstate and international airlines. Three separate appeals were consolidated for oral argument. We refer to the cases by their Court of Appeals numbers.

In number 89-1142, the Defendant-Appellant is Jim Mattox, the Attorney General of Texas. The Plaintiffs-Appellees are Trans World Airlines, Inc. (TWA), Continental Airlines, Inc. (Continental) and British Airways, PLC (British Air).

In numbers 89-1509 and 89-1610, the Defendants-Appellants are the attorneys general of Texas and thirty-three other states. The Plaintiffs-Appellees are TWA, Continental, British Air, Pan American World Airways, Inc. (Pan Am) and ten other airlines.

We affirm the orders appealed from in each of the three appeals.

I. *Background*

A. History of Proceedings

Number 89-1142:

In December 1987, the National Association of Attorneys General (NAAG) adopted guidelines related to airline advertising. The guidelines provide that any fuel, tax or other surcharge to air fare must be included in the total advertised price of the fare. The guidelines are not law.

On November 14, 1988, the attorneys general of Texas and four other states sent letters to TWA, Continental and British Air, notifying them that some of their advertisements

violated the NAAG guidelines and these states' false advertising and deceptive practices laws. The letters charged that the airlines had attempted to make their fares appear lower than those of their competitors by prominently advertising the ticket price, while less prominently disclosing taxes, surcharges and fees.

In particular the Attorney General of Texas stated that the airlines had violated the Texas Deceptive Trade Practices Act. The Attorney General advised the airlines that advertising a specific amount for a fare was deceptive if the advertised amount did not reflect the true cost of travel because certain surcharges had not been included in the advertised fare. The letter threatened prosecution.

In January 1989, TWA, Continental and British Air filed suit in the United States District Court for the Western District of Texas to enjoin the Attorney General of Texas from enforcing the Texas Deceptive Trade Practices Act against their advertising. Following a hearing, the district court granted a preliminary injunction. 712 F.Supp. 99. The court found it probable that the plaintiffs would prevail in establishing their claims that any state regulation of advertising related to the airlines' rates, routes and services had been preempted by federal law. The injunction forbade the Attorney General of Texas and all other persons acting in concert with him from initiating any enforcement action under state law, "which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services." The district court later clarified its injunction by stating that it applied only to the Attorney General of Texas and to the laws of Texas. In number 89-1142, the Attorney General of Texas appeals from the order granting the preliminary injunction.

Number 89-1509:

On March 16, 1989, the plaintiffs TWA, Continental and British Air filed a motion to broaden the preliminary injunction to include the attorneys general of thirty-three other states who had adopted the NAAG guidelines on airline advertising and who had appeared in a hearing in number 89-1142.

On April 27, 1989, the district court issued an order granting the motions of ten other airlines to intervene as plaintiffs. The court also granted the plaintiffs permission to amend their complaint to add as defendants the attorneys general of the thirty-three other states who had appeared in the action. The court then broadened the preliminary injunction to include the attorneys general of the other thirty-three states.

The district court noted that since the injunction had been issued on January 30, 1989, against the Attorney General of Texas, suits had been filed by the Attorneys General of California, Kansas and New York against TWA seeking to force the airline to comply with state laws concerning advertising. Also, the Attorney General of Texas had filed a similar suit against Pan Am. The broadened injunction acted prospectively and did not affect these pending state court cases against TWA and Pan Am. The thirty-four attorneys general appeal this broadening order in number 89-1509.

Number 89-1610:

After the Attorney General of Texas sued Pan Am in state court, charging deceptive practices, Pan Am removed the case to the United States District Court for the Northern District of Texas. Attorney General Mattox objected to removal to federal court and moved to remand the case to state court. His motion was denied. This case was then transferred to the United States District Court for the Western District of Texas. On May 30, 1989, the District Court for the Western

District consolidated this removed case with number 89-1509. The court issued an order granting Pan Am's motion to intervene in number 89-1142 and broadening the preliminary injunction to include Pan Am among the airlines against whom the enjoined states could take no new action. The thirty-four state attorneys general appeal this order of the district court in number 89-1610.

B. Brief Overview of Federal Regulation (and Deregulation)

The framework for federal regulation of civil aviation was set forth in the Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 973 (1938). This statute created the Civil Aeronautics Authority, whose name was changed to the Civil Aeronautics Board (CAB) in 1940, and vested it with broad powers to regulate commercial aviation. Included in that portion of the statute dealing with economic regulation was section 411, which gave the Authority the power to determine if any carrier engaged in unfair or deceptive practices or unfair methods of competition. *Id.* at 1003. The statute also contained a savings clause in section 1106, which stated that nothing contained in the Act would "abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." *Id.* at 1027.

The Federal Aviation Act of 1958, Pub.L. No. 85-726, 72 Stat. 731 (1958) (the Act), continued the CAB and created the Federal Aviation Agency (FAA). The Act reenacted section 411 as it appeared in the Civil Aeronautics Act of 1938, except for substitution of "Board" for "Authority." It also reenacted section 1106, which provided that other common law and statutory remedies remained viable.

Congress enacted the Airline Deregulation Act in 1978. Pub.L. No. 95-504, 92 Stat. 1705 (1978) (Deregulation Act). The purpose of this statute was to encourage and develop an

air transportation system that "relies on competitive market forces to determine the quality, variety, and price of air services." *Id.* The Deregulation Act directed the CAB to consider a number of factors to be in the public interest, including "[t]he prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation." *Id.* at 1706. The Deregulation Act did not change sections 411 or 1106 of the existing statute, but did add a federal preemption provision. Section 105 stated that "no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *Id.* at 1707-08.

The House Committee on Public Works and Transportation noted that "[e]xisting law contains no specific provision on the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts. . . ." H.R.Rep. No. 1211, 95th Cong., 2d Sess. 15-16 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 3737, 3751-52. The Committee intended section 105 to "prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services." H.R.Rep. No. 1211 at 16; 1978 U.S.Code Cong. & Admin.News at 3752.

The Deregulation Act also contained "sunset provisions" terminating some of the CAB's authority and transferring some authority to the Department of Transportation (DOT) and other federal departments. The sunset provisions neither terminated nor transferred the CAB's authority under section 411.

In 1980, Congress amended section 102 of the Act by adding a more comprehensive treatment of matters to be considered in the public interest. This treatment contains a new emphasis on "maximum reliance on competitive market forces and on actual and potential competition" to achieve the goals of safe, efficient and economic air transportation. Pub.L. No. 96-192, 94 Stat. 35 (1980). However, since 1938 it has been in the public interest for the CAB to promote adequate, economical and efficient air service without unfair or destructive competitive practices. 52 Stat. 980; 49 U.S.C.App. § 1302(a)(3). And, since 1978 "the prevention of unfair, deceptive, predatory or anticompetitive practices" has been in the public interest. 92 Stat. 1706; 49 U.S.C.App. § 1302(a)(7).

Finally, Congress enacted the Civil Aeronautics Board Sunset Act of 1984, Pub.L. No. 98-443, 98 Stat. 1703 (1984) (Sunset Act). This law terminated or transferred the remaining functions of the CAB and provided for its demise. Sections 411 and 1106 of the original Act were neither terminated nor transferred. However, the Sunset Act contained a provision that all authority of the CAB neither terminated on or before January 1, 1985, nor otherwise transferred, was transferred by law to DOT. *Id.* at 1704. The Sunset Act made no material changes in sections 105 and 411, the preemption provision and the section dealing with "unfair or deceptive practices or unfair methods of competition," respectively. They are codified now as 49 U.S.C.App. §§ 1305 and 1381. Section 12 of the Sunset Act added savings provisions that continued in effect all rules, regulations, orders and determinations of the CAB and gave the same authority as held by the CAB to any agency to which CAB functions were transferred. These provisions are codified now as 49 U.S.C.App. § 1556. It also retained section 1106, now codified as 49 U.S.C.App. § 1506.

The House Committee on Public Works and Transportation noted that there was a need to clarify the status of some of the CAB's authority after sunset. H.R.Rep. No. 793, 98th Cong., 2d Sess. 1, 3 (1984), *reprinted in* 1984. U.S.Code Cong. & Admin.News 2857, 2859. The sunset provisions of the 1978 Deregulation Act did not deal with the authority to protect consumers and to prevent unfair competitive practices. H.R.Rep. No. 793 at 3; 1984 U.S.Code Cong. & Admin.News at 2859. The Committee concluded that this important authority should be continued and should be exercised by DOT. H.R.Rep. No. 793 at 4-6; 1984 U.S.Code Cong. & Admin.News at 2860-62. The following passages in the report are of particular interest:

> In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R.Rep. No. 793 at 4; 1984 U.S.Code Cong. & Admin.News at 2860.

> The Committee has determined that the Department of Transportation is the most appropriate agency to administer CAB's consumer protection and unfair competitive practice authorities. Under the ADA, DOT will get CAB's authority to protect consumers and competitors insofar as international aviation and essential air service (EAS) are involved, and it would be confusing and inefficient to have DOT protect consumers and carriers in international and EAS operations, and another agency, such as FTC, protect consumers and carriers in other domestic operations. Airline flights frequently are not limited to one of these categories. Some airline flights provide both essential air transportation and other domestic transportation and other flights provide both domestic and international

> service. If two agencies shared authority for consumer protection, the rules could shift in mid-flight.

H.R.Rep. No. 793 at 6; 1984 U.S.Code Cong. & Admin.News at 2862. The concerns expressed by the Committee with respect to divided authority by more than one federal agency would appear equally valid with respect to a division of authority between the federal government and the states.

II

The Supreme Court has considered claims of preemption in many contexts, and has developed an analytical framework for deciding such claims. The Court recently wrote:

> The circumstances in which federal law pre-empts state regulation are familiar. See *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 383 [103 S.Ct. 1905, 1912, 76 L.Ed.2d 1] (1983). See also *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-154 [102 S.Ct. 3014, 3022-3023, 73 L.Ed.2d 664] (1982). A pre-emption question requires an examination of congressional intent. *Id.*, at 152 [102 S.Ct., at 3022]. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. See, *e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 [103 S.Ct. 2890, 2898-2899, 77 L.Ed.2d 490] (1983). In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947). Finally, even where Congress has not

> entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 [83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248] (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 [61 S.Ct. 399, 404, 85 L.Ed. 581] (1941).'" *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 [107 S.Ct. 1419, 1425, 94 L.Ed.2d 577] (1987), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 [104 S.Ct. 615, 621, 78 L.Ed.2d 443].

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988). See also, *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205 (5th Cir.1985).

We look first to see if state laws pertaining to deceptive advertising have been expressly preempted by federal law when applied to fare advertising by interstate and international airlines. It will be necessary to consider preemption by implication only if we find no express preemption.

A.

The airlines contend that section 105(a)(1) of the Act expressly preempts state laws pertaining to the advertising of fares by airlines. Section 105, as noted, was added to the Act in 1978 by the Deregulation Act. Section 105(a)(1), states:

> (a) Preemption
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or

> services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation.

49 U.S.C.App. § 1305(a)(1) (1988). The exception in paragraph (2), referred to in the quoted text, has no application to this case.

The Attorney General of Texas, joined by the other state attorneys general in their briefs, argues that the state has the power to regulate the deceptive advertising of fares by airlines, and that federal law does not preempt his right to enforce state law. He contends that section 105 only preempts state regulations relating to the rates, routes or services of airlines, but does not expressly preclude state regulations relating to all airline operations. He maintains that state regulation of deceptive fare advertising by airlines does not relate to rates, routes or services. Attorney General Mattox argues that the legislative history of section 105 does not indicate congressional intent to preempt state regulation of deceptive fare advertising by airlines. Such regulation by the states protects the competitive functioning of the market place, he contends, and was not within the scope of state regulations that Congress intended to preempt.

The airlines respond that section 105 preemption applies to all laws "relating to rates, routes, or services" of airlines, and that the advertising of fares by airlines clearly relates to rates. Thus, the airlines argue that the district court correctly enjoined the state attorneys general from enforcing the various state laws. In addition, they note that section 411 of the Act, 49 U.S.C.App. § 1381, empowers DOT to regulate "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

B.

In our discussion we refer to the sections of the Act by their presently codified numbers. We conclude that state laws

proscribing deceptive advertising are preempted by § 1305(a)(1) when a state attempts to enforce such laws against the advertising of fares by interstate and international airlines. Neither the Supreme Court nor any court of appeals has decided this precise issue. Two courts of appeals, however, have found express preemption of certain aspects of airline operations. See *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir.1989) and *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir.1989). These courts of appeals have particularly relied upon the Supreme Court's construction of section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA) which preempts all state laws "insofar as they . . . relate to any employee benefit plan." *Shaw v. Delta Air Lines*, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). In *Shaw* the Court concluded that Congress used "relate to" in the broad sense and that any law "'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-98, 103 S.Ct. at 2899-2901.

Illinois Corporate Travel was an action brought by a travel agent against American Airlines, in which the travel agent asserted a federal antitrust claim and three state law claims. One of the state law claims was based on the Illinois Consumer Fraud and Deceptive Business Practices Act, and the others were based on common law. 889 F.2d at 752, 754. The travel agent had advertised that it offered discounts on American's tickets, and American attempted to stop such discount price advertising by denying the travel agent access to the plate used to issue tickets for the airline and by informing other airlines that it would not accept tickets that the travel agent wrote using their plates. American also issued an addendum to the agreement all travel agents must sign forbidding those selling its tickets to advertise that they offer discounts. *Id.* at 752.

The Seventh Circuit affirmed the district court's decision to dismiss two of the state law claims because they were preempted by § 1305(a)(1). Noting the Supreme Court's observations in *Shaw*, the court stated, "Price advertising surely 'relates to' price; the 'relating to' language in § 1305(a)(1) substantially increases the extent of preemption." *Id.* at 754. The court also disposed of the travel agent's argument that the language in § 1506 (the "savings clause") preserved the state law claim. The court held that this section preserves state law claims from implicit preemption, but not from express preemption. If a state law relates to "rates, routes, or services," it is preempted; "the absence of contrary federal law is irrelevant." *Id.*

In *New England Legal Foundation*, the court of appeals reversed a district court decision that the state authority could enact a landing fee scheme that created great disparity between user fees charged smaller and larger aircraft. 883 F.2d at 175. There were many issues in the case, but its outcome turned on the determination of DOT's role after deregulation and the application of § 1305(a)(1). Administrative proceedings were begun before an ALJ prior to institution of the district court action. DOT and the district court reached contrary conclusions concerning the validity of the landing fee scheme. *Id.* at 171.

The court of appeals concluded that DOT had primary jurisdiction and that the district court should have deferred to DOT's interpretation of § 1305(a)(1). The court noted that the CAB's regulatory responsibilities that survived deregulation were assigned to DOT, and stated:

> In reducing federal economic regulation of the field to allow the forces of free competition to rule the marketplace, Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation. Congress expressly preempted state and local regulation by enacting §

> 105(a), which specifically provides that "no state or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision . . . relating to rates, routes, or services of any air carrier. . . ." 49 U.S.C.App. § 1305(a).

Id. at 173. The court concluded that the landing fee scheme was preempted by § 1305(a)(1). *Id.* at 175.

In addition, without referring to *Shaw*, this court and other courts of appeals have found express preemption under § 1305(a)(1).

This court concluded in *O'Carroll v. American Airlines*, 863 F.2d 11 (5th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 3158, 104 L.Ed.2d 1021 (1989) that § 1305(a)(1) preempted state law claims for damages by a passenger who was excluded from a flight after creating a disturbance on a plane. The court found that this section expressly preempted the state laws relied upon by the plaintiff, thus making consideration of implied preemption unnecessary. *Id.* at 13.

Two courts have found that § 1305(a)(1) preempted state laws concerning the treatment of handicapped passengers. In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir.1984), the court of appeals affirmed a directed verdict for the airline on a blind passenger's state law claims for discrimination in seating. The court found that state anti-discrimination laws were preempted as "relating to" services within the meaning of § 1305(a)(1). *Id.* at 1415. Accord *Anderson v. USAir*, 818 F.2d 49 (D.C.Cir.1987).

C.

The attorneys general cite three recent decisions by federal district courts concerning state regulation of the advertising of fares by airlines: *New York v. Trans World Airlines*, 728 F.Supp. 162 (S.D.N.Y.1989); *California v. Trans World Airlines*, 720 F.Supp. 826 (S.D.Cal.1989); and *Kansas v. Trans World Airlines*, 730 F.Supp. 366

(D.Kan.1990). In each case, the state attorney general filed a state court suit against the airline, alleging that the airline's advertising of fares violated state deceptive practices laws. The airline removed the case to federal court. Then, the attorney general moved to remand the action to state court, and the district court granted the motion.

In *New York*, the court found that § 1305(a)(1) does not expressly preempt the State's enforcement of its deceptive practice laws concerning airline advertising. 728 F.Supp. at 176. The court concluded that any relationship between New York's enforcement of its laws against deceptive advertising and an airline's rates, routes and services is remote and indirect. *Id.* at 176. The court expressed concern that a finding that § 1305(a)(1) preempted New York law might "doom every state regulation affecting airlines." *Id.* at 176.

The district court in *California* made the following observation:

> In the instant case, plaintiff [state attorney general] could not bring an action under the Federal Aviation Act or its counterparts to enjoin the alleged false advertising. It appears from the statute that only the Administrator of the FAA may institute a civil action against an airline for a violation of the statute. See 49 U.S.C.A.App. § 1471. In fact, the whole contention of defendant [airline] is that the Department of Transportation (DOT) has sole authority to enforce alleged unfair advertising. Assuming arguendo that state regulation of airline advertising were preempted, since the Federal Aviation Act gives plaintiff no cause of action, plaintiff may bring a suit to enforce its alleged right in state court, and such a case "arises under" state law only. *See Franchise Tax Board,* [*v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)], *supra.*

California, 720 F.Supp. at 828.

In *Kansas*, the court found:

> TWA has not met its burden of demonstrating clear congressional intent to make cases such as the present one removable. The court finds that the language of the preemption section precluding state regulation "relating to rates, routes or services" does not by its terms include advertising. [Citation omitted]. The Court accordingly finds that the Act does not provide a basis for removal under the "complete preemption" exception to the well-pleaded complaint rule. [Citation omitted].

Kansas, 730 F.Supp. at 368.

In addition, the attorneys general rely on *People v. Western Airlines*, 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (Cal.Ct.App.1984), *cert. denied*, 469 U.S. 1132, 105 S.Ct. 815, 83 L.Ed.2d 808 (1985). There the court noted that Congress had granted the CAB broad authority to regulate unfair competition and deceptive practices by airlines, but the court concluded that there was no inherent conflict between this authority and California's enforcement of its false advertising laws against interstate air carriers. 202 Cal.Rptr. at 238-39. This decision appears to turn on a finding of no implied preemption, rather than an examination of § 1305 to determine whether Congress had expressly preempted the state law action.

Also, the attorneys general cite *Nader v. Allegheny Airlines*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976), in which the Court held that a common-law tort action for fraudulent misrepresentation was not preempted by reason of the CAB's authority over "deceptive practices" under § 1381. However, *Nader* was decided prior to the addition of § 1305 to the Act. Thus, there was no basis for a finding of express preemption at the time of the decision.

D.

Unlike the district courts in *New York, California* and *Kansas*, we believe the history of federal legislation regulating airlines demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only. See discussion of remand in relation to Pan Am in Part V, *infra*. From the Civil Aeronautics Act of 1938 until the Deregulation Act of 1978, Congress gave the CAB vast powers of economic regulation over the airline industry, including the regulation of rates, routes and services. See 52 Stat. 973 (1938); 72 Stat. 731 (1958); 92 Stat. 1705 (1978). The Deregulation Act restricted the CAB's authority to regulate some of these areas. In changing the longstanding role of the CAB, Congress acknowledged that these changes could cause confusion concerning federal and state roles in airline regulation. Specifically, the House Committee on Public Works and Transportation observed that the Deregulation Act lacked specific provisions concerning state and federal jurisdiction over airlines, and thereby created "uncertainties and conflicts" in this regard. H.R.Rep. No. 1211 at 15-16; 1978 U.S.Code Cong. & Admin.News at 3751. By including § 1305 in the Deregulation Act to preempt state regulation of airline routes, rates or services, Congress hoped to "prevent conflicts and inconsistent regulations." H.R.Rep. No. 1211 at 16; 1978 U.S.Code & Cong. & Admin.News at 3752.

Subsequent legislation has confirmed the intent of Congress to preempt state regulation of airline fare advertising. Since the enactment of the Deregulation Act, Congress has retained § 1305. Through the Sunset Act of 1984, Congress transferred to DOT the CAB's power to control unfair or deceptive trade practices under § 1381. 49 U.S.C.App. § 1551(b)(1)(E). In so doing, Congress intended to protect consumers by providing a uniform system of federal regulation of unfair or deceptive practices by airlines. The

House Committee on Public Works and Transportation stated that "federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines." H.R.Rep. No. 793 at 4; 1984 U.S.Code Cong. & Admin.News at 2860.

Given the history of congressional concern and the inclusion of specific preemption language in the Deregulation Act, we agree with the Seventh Circuit in *Illinois Corporate Travel* that airline fare advertising "relates to" rates within the meaning of § 1305(a)(1). Although the state laws against deceptive advertising are not aimed specifically at airlines, and clearly do not attempt to set rates, the conclusion is inescapable that such laws do "relate to" rates when applied to airline fare advertising. As the Supreme Court noted in *Shaw*, a law relates to a particular subject "if it has a connection with or reference to" that subject. 463 U.S. at 96-97, 103 S.Ct. at 2899-2900. It cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1). Therefore, such state action is expressly preempted by § 1305(a)(1).

The attorneys general remind us that § 1506, which preserves remedies that exist at common law and by state statute, also survived the Sunset Act. They contend that this provision enables them to enforce their states' deceptive advertising laws as an additional remedy to those provided by the Act. However, in a case involving the express preemption of airline services, this court found that § 1305 clearly indicated congressional intent to preempt and controlled over a state law claim submitted under § 1506. *O'Carroll*, 863 F.2d at 13. In the present case involving the advertising of fares by airlines, we follow the reasoning in *O'Carroll* and agree with

the Seventh Circuit in *Illinois Corporate Travel*; § 1506 does not preserve state law remedies when there is express preemption under § 1305. See *Hingson*, 743 F.2d at 1416 n. 11.

In summary, we believe it is clear that by enacting §1305 Congress intended to retain in the federal government, exclusive authority over airline advertising of fares. It is not as though Congress had left a vacuum which the states needed to fill in order to protect their citizens. The provisions of the Act under which the CAB regulated unfair or deceptive practices of airlines, particularly § 1381, were neither terminated nor transferred to other agencies; they were transferred by operation of law to DOT. Thus, DOT inherited the CAB's role under § 1381 with respect to unfair and deceptive practices. With the advent of deregulation and the demise of the CAB, Congress continued to vest authority over such practices in a federal agency. Congress provided for its concern that consumers of airline services be protected under a uniform system of regulation by adding § 1305. This express preemption provision was intended "to prevent conflicts and inconsistent regulations" concerning airline advertising of fares, which relates to rates within the meaning of the provision.

Having concluded that § 1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising, we do not reach the parties' arguments concerning implied preemption.

III.

The attorneys general also argue that the airlines failed to meet the burden of proving the requirements for granting a preliminary injunction and, therefore, the district court abused its discretion by issuing the preliminary injunction against enforcement of the various state laws. As we have indicated, enforcement actions by the states are preempted; thus, the

airlines have demonstrated a substantial likelihood of success on their claim for a permanent injunction. Likelihood of success is the first requirement for granting a preliminary injunction. The other three requirements are: (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury to the one seeking the injunction outweighs any damage it may cause the other party; and (4) that the injunction will not be against the public interest. *Plains Cotton Coop. Ass'n v. Goodpasture Computer Service*, 807 F.2d 1256, 1259 (5th Cir.), *cert. denied*, 484 U.S. 821, 108 S.Ct. 80, 98 L.Ed.2d 42 (1987). Under the facts of this case we believe the finding with respect to likelihood of success carries with it a determination that the other three requirements have been satisfied.

Congress has exercised its authority under the Commerce Clause to regulate airlines and by adopting § 1305 has chosen to preempt all enforcement of state laws relating to rates, routes or services of airlines. Congress has declared that it is in the public interest for a federal agency to guard against unfair or deceptive practices by airlines. If the states were permitted to enforce their various laws, the airlines would be subjected to the demands and criteria of numerous legislatures rather than being required to comply only with federal laws and regulations. This would cause irreparable injury by depriving the airlines of a federally created right to have only one regulator in matters pertaining to rates, routes and services. The appellants miss the thrust of the airlines' argument by contending that the only threatened injury is a loss of revenue, which is not irreparable. We conclude that permitting states to regulate airline advertising in the face of the preemption language of § 1305(a)(1) would violate the Supremacy Clause, causing irreparable injury to the airlines. Therefore, the second requirement for an injunction is satisfied.

With regard to the third requirement, there is no injury to the states to weigh against that which they threaten to inflict on the airlines. Since Congress expressly preempted this area of regulation, the states are not injured by the injunction.

Finally, the fourth requirement is satisfied by the finding of Congress that exclusive federal regulation in matters relating to airline rates, routes or services is in the public interest.

We conclude that the airlines met their burden of proving the four requirements and the district court properly issued the preliminary injunction.

IV.

In number 89-1509 the attorneys general of thirty-three states[1] appeal from the order of the district court broadening the preliminary injunction to include them and permitting the airlines to name and serve them as additional defendants in the pending action against the Attorney General of Texas. The Attorney General of Texas also appeals from this order.

A.

A brief outline of the background and participation of these attorneys general in the *TWA v. Mattox* litigation is in order.

In June 1987, as a result of a resolution co-authored by the Attorney General of Texas, the NAAG appointed a task

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1 Kansas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

force to study the advertising and marketing practices of the airline industry in the United States.

In a letter dated October 19, 1987, DOT informed the Attorney General of California that a number of the proposed NAAG guidelines concerning airline advertising appeared to be preempted by federal law.

In December 1987, the NAAG adopted the guidelines. On February 3, 1988, the attorneys general of Texas and six other states wrote several airlines threatening "protracted litigation" to bring their advertisements into compliance with the guidelines. In a March 2, 1988, letter from DOT to the Attorney General of Texas, DOT stated that state regulation of fare advertising by airlines, as set forth in the guidelines, was preempted by federal law.

On November 14, 1988, the Attorney General of Texas sent a letter to Plaintiffs TWA, Continental and British Air on behalf of the states of California, Massachusetts, New York, Texas and Washington. The letter stated that it was the position of the states that any fuel tax or other surcharge to air fare must be included in the total advertised price. The attorneys general indicated an intent to sue the airlines under their respective state laws.

TWA, Continental and British Air commenced this action against the Attorney General of Texas on January 23, 1989, and moved for a temporary restraining order (TRO). On January 24, 1989, the Attorney General of Texas notified four states of the suit and advised them that the suit could restrict all states from enforcing their laws against airlines. Other states were also informed.

On January 27, 1989, the date of the hearing on the TRO, thirty-three states filed a motion, which reads in pertinent part:

> Motion of Specially Appearing States to Deny Plaintiffs' Motion for Temporary Restraining Order or in the Alternative Motion to Extend Date for Hearing on Temporary Order
>
> Without admitting or submitting to the subject matter jurisdiction of this Court and without admitting that this Court has personal jurisdiction over them, the states of Kansas, Alaska, . . . Wyoming specially appear before this Court to move for an order denying the plaintiffs' motion for a temporary restraining order or in the alternative to ask this Court to set a future date upon which to hear plaintiffs' motion as a noticed motion for temporary restraining order.

The attorneys general stated in their motion that they had been "informed" that the airlines were seeking a TRO "that could have the effect of prohibiting such states from enforcing their own laws even though they were not named as defendants nor served by plaintiffs with a copy of the action currently before this Court."

The Attorney General of Kansas then participated in the TRO hearing. After the Assistant Attorney General of Texas had argued against entry of a TRO, the Attorney General of Kansas addressed the court. He stated that he appeared for the purpose of responding on behalf of thirty-four state attorneys general. He argued that the other attorneys general were not responsible for the individual actions of the states of Texas and Kansas under those states' consumer protection laws—attorneys general cannot act in concert with one another except to the extent their laws are similar. He argued that since each state acted individually to enforce its laws, the states could not be sued collectively "unless there's something that would bring the state under the umbrella of some kind of federal action. And states don't set rates, rules and regulations. . . . The bottom line . . . is that individual states should not be precluded in advance as they consider enforcement of their state law in their state court."

The district court denied motions to stay and on January 30, 1989, issued the preliminary injunction prohibiting the Attorney General of Texas from initiating any enforcement action to regulate the advertising of fares by TWA, Continental or British Air. Attorney General Mattox appealed on February 10, 1989 (No. 89-1142). On February 14, 1989, the Attorney General of Kansas filed a motion to clarify the injunctive order. He requested the court to enter a "Substituted Order," which he attached to the motion. On February 27, 1989, the district court entered an order granting the Kansas motion. It stated:

> The Court's Order of January 30, 1989 does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than Jim Mattox, Attorney General of Texas, nor does that order apply to any law other than the laws of the State of Texas.

On March 16, 1989, TWA, Continental and British Air filed a motion to broaden the preliminary injunction to include the attorneys general of thirty-three other states who had adopted the NAAG guidelines on airline advertising and who "specially appeared" in the TRO hearing in January. On March 29, 1989, ten additional airlines filed a motion for leave to intervene. Copies of the motions to broaden the preliminary injunction and to permit additional airlines to intervene were sent to the Attorneys General of Texas and Kansas. Neither motion was served on any of the attorneys general of the other thirty-two states.

On April 4, 1989, the Attorney General of Kansas filed a response denying that the district court had subject matter or personal jurisdiction over him.

On April 27, 1989, the district court filed an order broadening the preliminary injunction to include the attorneys

general of the other thirty-three states. Also, the court granted the motions of the ten other airlines to intervene as plaintiffs.

The district court noted that since the injunction was issued on January 30, 1989, against the Attorney General of Texas, suits had been filed by the Attorneys General of California, Kansas and New York against TWA seeking to force the airline to comply with state laws concerning advertising. Also, the Attorney General of Texas had filed a similar suit against Pan Am.

The district court granted the plaintiffs leave to amend their complaint to include those attorneys general who, acting in concert with Attorney General Mattox or among themselves, were attempting to use state law to enforce the NAAG guidelines relating to airline advertising. This injunction operates prospectively and does not act to interfere with the four cases mentioned above.

B.

Unlike subject matter jurisdiction, jurisdiction over the person can be waived. *Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1107 (5th Cir.1985). The *Cactus Pipe* court adopted the following statement made in *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir.1972), "If a party enters a case, makes no objection to jurisdiction, and asks the court to act on its behalf in some substantive way, it will be held to have waived further objection." *Cactus Pipe*, 756 F.2d at 1108. In *Rauch v. Day & Night Mfg. Corp.*, the court stated that a court can acquire jurisdiction over a nonresident only by actual service within the jurisdiction "*or by his waiver, by general appearance or otherwise, of the want of due service.*" 576 F.2d 697, 700 (6th Cir.1978) (quoting *Goldey v. Morning News*, 156 U.S. 518, 521, 15 S.Ct. 559, 560, 39 L.Ed. 517 (1895)) (emphasis in original).

In the present case the plaintiffs filed suit only against the Attorney General of Texas. Although they sought a TRO against the defendant and "any person in active concert or participation with him," the only relief prayed was from enforcement actions "under the laws of the state of Texas." The complaint and motion for an injunction did not seek to enjoin the enforcement of any laws but those of Texas. The other thirty-three attorneys general joined the Attorney General of Texas in asking the district court to deny the injunction. At that time, they had neither been named defendants nor served with process. They stated that they filed the motion because they had been informed, presumably by the Attorney General of Texas, that the plaintiffs were seeking an injunction that would interfere with the enforcement of their states' laws.

The record does not support this conclusion. The airlines' motion for a TRO referred to the actions of the NAAG in promulgating the guidelines, but sought relief only against Texas. Nevertheless, the attorneys general of thirty-three other states filed a motion asking the district court to deny the airlines' motion for a TRO against enforcement of Texas laws. Although they described themselves as "specially appearing," the attorneys general sought an affirmative act by the court that would benefit their states. The fact that they sought affirmative relief controls, not the form of their appearance, for the distinction between general and special appearances no longer exists in federal courts. A party may appear generally and yet object to personal jurisdiction at any time before the answer is filed or in the answer. *Grammenos*, 457 F.2d at 1070; Fed.R.Civ.P. 12(h). The thirty-three attorneys general were not parties, however, when they filed their motion. They had no basis for objecting to the court's jurisdiction as they had not been named defendants and no attempt had been made to bring them before the court by process.

It appears to us that the thirty-three attorneys general became *de facto* intervenors when the Attorney General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf. At that point it was irrelevant that the thirty-three attorneys general had not been sued or served; they chose to take part in the pending action as if they were parties. True, they did not seek to intervene under Fed.R.Civ.P. 24. On the other hand, they did not appear as amici curiae. Without being required to do so, they came voluntarily into court and joined with the Attorney General of Texas in seeking dismissal of the injunctive action. The arguments made by the Attorney General of Kansas on behalf of Texas and the other thirty-three states went to the heart of the issue before the district court. We believe the thirty-three attorneys general waived any objection to the jurisdiction of the court over their persons as representatives of their respective states. Thus, we affirm the order broadening the preliminary injunction to include the attorneys general of the thirty-three states and permitting the plaintiffs to amend their complaint to name and serve those attorneys general as additional defendants.

V.

In number 89-1610, the attorneys general of Texas and thirty-three other states appeal from the district court order that permitted the intervention of Pan Am as a plaintiff and broadened the scope of the preliminary injunction to include Pan Am. They argue that the complaint filed against Pan Am in state court by the Attorney General of Texas raised only state law issues and presented no federal question. As a result, the District Court for the Northern District of Texas lacked subject matter jurisdiction and erred in permitting removal, denying the Texas motion to remand to state court and transferring the case to the District Court for the Western District of Texas. They further assert that due to the lack of

subject matter jurisdiction, the Western District erred in consolidating this action with that of *TWA v. Mattox*, granting Pan Am's motion to intervene as a plaintiff, and in broadening the preliminary injunction to include Pan Am.

Ordinarily, the existence of a federal question for removal purposes is determined according to the "well-pleaded complaint" rule. Under that rule, removal cannot be based on the existence of a federal defense. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987). As the Court noted in *Taylor*, however, Congress may so completely preempt a particular area, that "any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63-64, 107 S.Ct. at 1546-1547. It has long been recognized that section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, has such preemptive force. In *Taylor*, the Court found that ERISA's preemption provision is similarly so strong that every claim for benefits under a covered plan is regarded as arising under the laws of the United States. This determination was based on "the clearly manifested intent of Congress." *Id.* at 67, 107 S.Ct. at 1548.

An examination of the preemption language in § 1305(a)(1) and its legislative history leads to the conclusion that Congress did intend to preempt so completely the particular area of state laws "relating to rates, routes, or services" as to preclude state court actions. Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states. We agree with the First Circuit that Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Foundation*, 883 F.2d at 173. Congress made this clear by including the express preemption provision in the Deregulation Act. The legislative history of § 1305 exhibits a

congressional intent to treat a complaint raising "this select group of claims" as "necessarily federal in character." See *Taylor*, 481 U.S. at 63-64, 107 S.Ct. at 1546-1547. The complaint filed against Pan Am in state court by the Attorney General of Texas alleged that Pan Am had violated the Texas Deceptive Trade Practices Act through deceptive advertising of air fares. This claim relates to airline rates within the meaning of § 1305(a)(1) and is federal in character; therefore, we conclude that there is federal question jurisdiction.

In addition, we conclude that the Western District properly permitted Pan Am to intervene as a plaintiff pursuant to Fed.R.Civ.P. 24(b)(2). Pan Am's defense that the enforcement action of the Attorney General of Texas under the Texas Deceptive Trade Practices Act is preempted by §1305(a)(1) presents a question of law in common with that relied upon by the other plaintiff airlines in this case.

Finally, we find that the Western District properly broadened the scope of the preliminary injunction to include Pan Am. However, this injunction operates prospectively and specifically states that the action by the Attorney General of Texas against Pan Am is excepted from the injunction. Therefore, the preliminary injunction does not enjoin the Attorney General of Texas from prosecuting this suit against Pan Am, but it does enjoin him and the attorneys general of the other thirty-three states from bringing similar suits against the airline.

Conclusion

To summarize, we affirm the order of the district court in number 89-1142. The court issued a preliminary injunction that forbade the Attorney General of Texas and all other persons acting in concert with him from initiating any enforcement action under state law, which would seek to regulate the advertising of fares by plaintiffs TWA, Continental and British Air. The court later clarified this

injunction by stating that it applied only to the Attorney General of Texas and to the laws of Texas.

In addition, we affirm the order of the district court in number 89-1509. Through this order, the court granted the motions of ten other airlines to intervene as plaintiffs. The court also granted plaintiffs TWA, Continental and British Air permission to amend their complaint and to add as defendants the attorneys general of thirty-three other states. And, the court broadened the preliminary injunction to include the attorneys general of the other thirty-three states. This broadened injunction operates prospectively and does not affect similar suits that had been filed by the Attorney General of Texas against Pan Am and the Attorneys General of California, Kansas and New York against TWA.

Finally, we affirm the order of the district court in number 89-1610. The court granted Pan Am's motion to intervene in number 89-1142 and broadened the preliminary injunction to include Pan Am among the airlines against whom the enjoined states could take no new action. The preliminary injunction operates prospectively and specifically states that the action by the Attorney General of Texas against Pan Am is excepted from the injunction. As a result, the injunction does not enjoin the Attorney General of Texas from prosecuting this suit against Pan Am, but it does enjoin him and the attorneys general of the other thirty-three states from bringing similar suits against the airline.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS PLC, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure and after careful consideration of the Complaint, Plaintiffs' Motion for and Memorandum in Support of a Temporary Restraining Order, the opposition thereto, and the arguments of counsel, and after notice to and appearance in open Court by the Defendant, the Court finds that Plaintiffs will suffer immediate and irreparable injury if the Attorney General of the State of Texas or parties in concert or participating with him are permitted to bring an enforcement action against Plaintiffs, or any of them, pursuant to Tex. Bus. & Comm. Code §§17.41 et seq. or any other state law, in accordance with the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"), on account of Plaintiffs' air fare advertising and other promotional and informational advertising. The Court finds that it is probable that: Plaintiffs will prevail in establishing their claims that any state regulation of advertising of the Plaintiffs' rates, routes, and services has been preempted by the Federal Government; subsection 2.5 of the NAAG Guidelines, which purportedly requires that "[a]ny

fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare," conflicts with the Federal Government's regulatory scheme; and the threatened enforcement action by Attorney General Mattox and others in concert or participating with him would be in violation of the Supremacy Clause of the United States Constitution. The Court further finds it unnecessary to determine the probability that the Plaintiffs will demonstrate that the threatened implementation or enforcement of the NAAG Guidelines through state law, including enforcement of the Guidelines by Attorney General Mattox through Tex. Bus. & Comm. Code §§17.41 et seq., or others in concert or participating with him through their respective state statutes, constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the Constitutional prohibition against interstate compacts that intrude into the federal domain (Art. 1, §10, cl. 3, U.S. Constitution); and violates Plaintiffs' First Amendment rights. In addition, the Court determines that granting the requested injunctive relief does not pose an untoward burden on Defendant and would, in fact, be in the public interest. Accordingly,

It is hereby ORDERED that Plaintiffs' Motion for Preliminary Injunction be and hereby is GRANTED.

It is further ORDERED that the Attorney General of the State of Texas, Jim Mattox, individually and in his official capacity, and all other persons acting for the Attorney General in either capacity, and all other persons acting in concert or participation with Attorney General Mattox or on his behalf, and all other persons having actual knowledge of this Order, be and hereby are ENJOINED from:

> initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq., or any other provision of state law, which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the

operations involving their rates, routes and/or services.

It is further ORDERED that Plaintiffs shall give security in the amount of $10,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the Court or by the Clerk of the Court.

SIGNED this 30th day of January, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS, PLC, Plaintiffs,	§	
v.	§	CIVIL NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Came on this date to be considered the motion of the Honorable Robert T. Stephan, Attorney General of the State of Kansas, to clarify and substitute this Court's Order granting a preliminary injunction in the above-styled and numbered case. The Court, having reviewed the motion, is of the opinion it is meritorious and should be granted. It is, therefore,

ORDERED that the Motion to Clarify and Substitute filed by the Attorney General of the State of Kansas be and hereby is GRANTED. The Court's Order of January 30, 1989 does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than Jim Mattox, Attorney General of Texas, nor does that order apply to any law other than the laws of the state of Texas.

SIGNED this 23rd day of February, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS, PLC, Plaintiffs,	§	
v.	§	CIVIL NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, Defendant.	§	

ORDER

Came on to be considered in the above-styled cause the Motion of Certain Air Carriers for Leave to Intervene and Plaintiffs' Motion to Broaden the Injunction issued by this Court. The Court, having reviewed both motions and the responses thereto, has determined that both motions are meritorious and should be granted.

This suit was originally filed by Plaintiffs Trans World Airlines, Inc., ("TWA"), Continental Airlines, Inc., ("Continental"), and British Airways PLC ("British Airways") against Jim Mattox, the Attorney General of the State of Texas. The Plaintiffs seek injunctive and declaratory relief, based upon the Attorney General's attempt to file suit against the airlines under the Texas deceptive trade practices act. The dispute centers around the advertising practices of the airlines, which the Attorney General claims are violative of Texas law. The airlines claim this issue has been preempted by federal law.

The original injunction issued by this Court protected only the named Plaintiffs against actions brought by the Attorney General of Texas under Texas law which regulate or restrict air fare advertising or operations involving rates, routes and/or services.

Since the injunction was issued by this Court on January 30, 1989, the Attorneys General of California, Kansas and New York have filed suit against Plaintiff TWA on the same grounds--seeking to force the airline to comply with state advertising regulations. Attorney General Mattox has filed suit on identical grounds in the 101st District Court of Dallas County, Texas against Pan American World Airways, Inc. ("Pan Am"), which has also requested leave to intervene in the present action.

Attorney General Mattox, not satisfied with attempting to regulate domestic air carriers, has also threatened legal action against foreign air carriers, including Lufthansa German Airlines ("Lufthansa"). The letter from Attorney General Mattox which threatens enforcement against Lufthansa also purports to be sent on behalf of the States of California, Massachusetts, New York, and Washington. As a result of these threats, Lufthansa, along with Air Canada, Compagnie National Air France ("Air France"), Alitalia-Lines Aeree Italiane, S.P.A. ("Alitalia"), El Al Israel Airlines, Ltd., ("El Al"), Finnair, Japan Air Lines Company, Ltd., ("JAL"), Qantas Airways, Ltd., ("Qantas"), Scandinavian Airlines System ("SAS"), and Viacao Aerea Rio-Grandense ("Varig"), have requested leave to intervene.

In addition, the Plaintiffs to this action request the Court to broaden its injunction to include the thirty-three states who have "specially appeared" in this action.

I. Motion to Intervene by Foreign Air Carriers

A. Intervention as a Right.

Rule 24(a) of the Federal Rules of Civil Procedure provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is undisputed that no statute confers an unlimited right to intervene in this action. As such, the parties must meet the requirements for intervention of right under 24(a)(2), which requires the following:

(1) the application for intervention must be timely;

(2) the applicant must have an interest relating to the property or transaction which is the subject of this action;

(3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest;

(4) the applicant's interest must be

> inadequately represented by the existing parties to the suit.

New Orleans Public Service v. United Gas Pipe Line, 732 F.2d 452, 463 (5th Cir. 1984) (en banc), citing International Tank Terminals, Ltd. v. M/V Acadia Forest, 579 F.2d 964, 967 (5th Cir. 1978).

1. Timeliness

Timeliness of intervention is determined from a review of all the circumstances. NAACP v. New York, 413 U.S. 345 (1973). The Fifth Circuit has established four factors to be considered by the Court in determining the timeliness of a petition for leave to intervene:

> Factor 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
>
> Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
>
> Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
>
> Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Lelsz v. Kavanaugh, 710 F.2d 1040, 1043 (5th Cir. 1983).

In the present action, the petition for leave to intervene was filed only two months after the main suit was filed, and only three months after Lufthansa learned of the threatened legal action by Attorney General Mattox. Although not specifically outlined in the Intervenor's response, the Court finds that there was no significant delay between the time the Intervenors knew or reasonably should have known of their interest in the suit and the time the petition for leave to intervene was actually filed. As such, the Intervenor's petition is timely.

Even if a two-to-three month delay is considered not timely, the existing parties will suffer no prejudice for failure of the Intervenors' to file their petition earlier. There are no existing suits filed against the Intervening parties, nor does their intervention in any way limit any existing rights of the Attorney General of the State of Texas. There is no evidence of any potential prejudice to the existing parties to the litigation.

On the other hand, the Intervenors will suffer great prejudice if not allowed to intervene. Attorney General Mattox has threatened suit against Lufthansa and could initiate suit against any of the other Intervenors at any time. The Intervenors are faced with great prejudice if not allowed to intervene.

Critical to this inquiry is adequacy of representation. See Lelsz v. Kavanaugh, 710 F.2d 1040 (5th Cir. 1983). "If the proposed intervenors' interests are adequately represented, then the prejudice from keeping them out will be slight." Id. at 1046. Here, the proposed intervenors' interests are not adequately represented. The proposed intervenors raise issues similar, but not identical to, those raised by the Plaintiffs. The laws related to foreign air carriers involve issues not pertinent to domestic air carriers.

As to Factor 4, there have been identified no unusual circumstances militating against a determination that the petition is timely. After a review of the facts as related to the above factors, the Court determines that the Intervenor's petition for Leave to Intervene was timely filed.

2. Interest

The Intervenor must demonstrate an "interest relating to the property or transaction which is the subject of the action." Rule 24(a)(2). An applicant for intervention need not be legally bound by the result of the main case, nor need his interest be identical to those claims asserted in the main action. New Orleans Public Service v. United Gas Pipe Line, 732 F.2d 452 (5th Cir. 1984) (en banc). However, intervention of

right does require a "direct, substantial, legally protectable interest in the proceedings." Id. at 463.

The Intervenors have exhibited such an interest in the present proceedings. If not permitted to intervene, they will be exposed to suit on grounds prohibited by the injunction issued by this Court. Further, the claims presented by the foreign air carriers, although not identical to those presented by the Plaintiffs in this suit, are sufficiently similar to establish a direct and substantial interest in these proceedings.

3. Protection of Interest

This third factor requires the applicant to establish that the disposition of the main action may impair or impede his ability to protect his interest in the subject matter of the action, which is demonstrated by the possibility of suit being filed against the prospective intervenors if not brought under the protection of this Court's injunction.

4. Adequacy of Representation

Finally, as stated previously, the Court has determined that the existing parties to the suit will not adequately represent the interests of the proposed intervenors. The specific issue as to whether an action can be brought under state law to regulate the advertising practices of a foreign air carrier will not be presented absent grant of leave to intervene.

B. Permissive Intervention

Even if intervention as of right under 24(a) is not mandated, then permissive intervention should be granted under Rule 24(b). This Rule provides:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the right of the original parties.

The proposed intervenors have established the existence of a question of law in common with those presented in the main action – specifically whether federal law preempts in the area of regulation of airline advertising. The main issue which prevents the intervenors' rights from being adequately represented by the Plaintiffs is the fact that the intervenors are foreign rather than domestic air carriers. Although federal law is substantially similar as it applies to both classes of air carriers, there are differences which will not be addressed absent intervention by the foreign air carriers.

In light of the preceding, the Motion of Certain Air Carriers for Leave to Intervene is **GRANTED**.

II. Motion to Broaden Injunction

The Plaintiffs seek to broaden the scope of the injunction issued by this Court on three grounds:

1) the evidence that other state attorneys general are acting "in concert" with Attorney General Mattox;
2) the attorneys general of thirty-three states have de facto intervened in this proceeding; and
3) the actions taken by various state attorneys general since this Court's preliminary injunction order threatens the Plaintiffs and this Court's jurisdiction.

Since this Court issued its preliminary injunction order, four additional suits have been filed against two air lines under other state laws in an attempt to regulate the airlines' advertising of their rates, routes and services:

1) Cause No. 89-2510-E, State of Texas v. Pan American World Airways, Inc., filed by Attorney General Mattox in the 101st District Court of Dallas County, Texas on February 28, 1989. This action was subsequently removed to Federal District Court in Dallas, Texas.
2) Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on March 9, 1989.

3) Cause No. _____, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the Supreme Court of the County of New York, State of New York on March 29, 1989.

4) Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989.

In light of these developments and upon further consideration of the issues in this action, the Court has determined that the injunction presently in effect must be broadened in order to provide meaningful protection to the Plaintiff airlines. The suits initiated in other states on identical grounds and against the same parties demonstrate to the Court that this matter is not merely of local interest, but rather one that is of nationwide concern. Decisions made in the course of these proceedings have the potential of effecting broad-sweeping changes in the airline industry.

The scope of this matter, clearly, is not limited to the activities of the Attorney General of Texas, but includes all Attorneys General involved in enforcing the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"). Therefore, the Court's injunction will be broadened to include not only Attorney General Mattox, but those State Attorneys General, acting in concert with Attorney General Mattox, or with each other, to enforce the NAAG guidelines through state law actions.

Failure to include these additional Defendants will seriously impair the ability of this Court to render a meaningful decision over the issue of whether federal law preempts state action in the matter of airline advertising. There is also a real possibility that the Plaintiff airlines will be subjected to a multiplicity of suits in various jurisdictions, thereby depriving this Court of the ability to offer any meaningful protection to the Plaintiffs. Despite the Plaintiffs' assertions that the additional Attorneys General be deemed intervenors, the Court has determined that the proper method of joinder is through Federal Rule of Civil Procedure 19.

Accordingly, it is **ORDERED** that Plaintiffs are hereby **GRANTED** leave to amend their complaint to include those Attorneys General who, acting in concert with Attorney General Mattox or among themselves, are attempting to use state law to enforce the NAAG guidelines relating to airline advertising within ten (10) days from the entry of this Order.

Prior to the addition of said Defendants as parties to this action, the Court's injunction will be broadened to include the following:

Hon. Grace Berg Schaible
Attorney General of Alaska

Hon. Robert K. Corbin
Attorney General of Arizona

Hon. Steve Clark
Attorney General of Arkansas

Hon. John Van De Kamp
Attorney General of California

Hon. Duane Woodward
Attorney General of Colorado

Hon. Clarine Nardi Riddle
Deputy Attorney General
(Acting Attorney General of Connecticut)

Hon. Robert Butterworth
Attorney General of Florida

Hon. Jim Jones
Attorney General of Idaho

Hon. Neil F. Hartigan
Attorney General of Illinois

Hon. Tom Miller
Attorney General of Iowa

Hon. Robert T. Stephan
Attorney General of Kansas

Hon. James E. Tierney
Attorney General of Maine

Hon. J. Joseph Curran, Jr.
Attorney General of Maryland

Hon. James M. Shannon
Attorney General of Massachusetts

Hon. Frank J. Kelley
Attorney General of Michigan

Hon. Hubert H. Humphrey, III
Attorney General of Minnesota

Hon. William L. Webster
Attorney General of Missouri

Hon. Robert M. Spire
Attorney General of Nebraska

Hon. Brian McKay
Attorney General of Nevada

Hon. Robert Abrams
Attorney General of New York

Hon. Lacy Thornberg
Attorney General of North Carolina

Hon. Nicholas Spaeth
Attorney General of North Dakota

Hon. Anthony J. Celebrezze, Jr.
Attorney General of Ohio

Hon. Robert Henry
Attorney General of Oklahoma

Hon. Dave Frohnmayer
Attorney General of Oregon

Hon. James E. O'Neil
Attorney General of Rhode Island

Hon. Roger Tellinghuisen
Attorney General of South Dakota

Hon. Charles W. Burson
Attorney General of Tennessee

Hon. Jeffrey Amestoy
Attorney General of Vermont

Hon. Kenneth O. Eikenberry
Attorney General of Washington

Hon. Charles G. Brown
Attorney General of West Virginia

Hon. Don J. Hanaway
Attorney General of Wisconsin

Hon. Joseph B. Meyer
Attorney General of Wyoming

The Court has determined that each of the above has an interest relating to the subject of this action and are so situated that the disposition of this action in their absence will leave those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Federal Rule of Civil Procedure 19(a)(2)(ii).

This injunction will operate prospectively only and will not act to interfere with the following proceedings:

1) Cause No. 89-2510-E, State of Texas v. Pan American World Airways, Inc., filed by Attorney General Mattox in the 101st District Court of Dallas County, Texas on February 28, 1989. This action was subsequently removed to Federal District Court in Dallas, Texas.

2) Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on March 9, 1989.

3) Cause No. _____, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the Supreme Court of the County of New York, State of New York on March 29, 1989.

4) Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989.

The Court would hope that, considering the possibility of conflicting judgments in this case, these state court proceedings would be abated pending this Court's final determination of this matter.

IT IS SO ORDERED.

SIGNED this 26th day of April, 1989.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., et al., Plaintiffs,	§	
v.	§	CIVIL NO. A-89-CA-067
JIM MATTOX, Attorney General of the State of Texas, et al. Defendant.	§	

ORDER

Came on this date to be considered the Motion of Pan American World Airways, Inc. ("Pan Am") for Leave to Intervene in the above-styled cause. The action pending against Pan Am in the United States District Court for the Northern District of Texas, Dallas Division, has been transferred to this Court and consolidated with the present action. The Court, therefore, has determined that the Motion to Intervene should be granted pursuant to Rule 24(b)(2), and that the protective order issued by this Court be broadened to include Pan Am.

IT IS SO ORDERED.

SIGNED this 26th day of May, 1989.

/s/ Walter S. Smith Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

TRANS WORLD AIRLINES, INC., CONTINENTAL AIRLINES, INC., and BRITISH AIRWAYS, PLC, ET AL., Plaintiffs,	§	
v.	§	CIVIL NO. A-89-CA-067 (consolidated)
JIM MATTOX, ATTORNEY GENERAL, STATE OF TEXAS,ET AL., Defendants.	§	

FINAL JUDGMENT

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and after careful consideration of the Amended Complaint, the opinion of the United States Court of Appeals for the Fifth Circuit in Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990), Plaintiffs' Motion for Judgment on the Pleadings, or for Summary Judgment, and for Entry of Final Judgment, the Defendants' response thereto, and the arguments of counsel, the Court finds that Plaintiffs will suffer immediate, irreparable and continuing injury if the attorneys general of the states of Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, or parties in concert or participating with them, are permitted to bring enforcement

actions against Plaintiffs, or any of them, pursuant to their respective states' laws, in accordance with the Air Travel Industry Enforcement Guidelines ("Guidelines") adopted by the National Association of Attorneys General ("NAAG"), on account of Plaintiffs' air fare advertising and other promotional and informational advertising.

The Court finds and declares that the Defendants have committed acts as set forth in Plaintiffs' Amended Complaint, and will continue to do so unless restrained by this Court; that there is no genuine issue of material fact; that Plaintiffs are entitled to judgment as a matter of law; that any state regulation of advertising of the Plaintiffs' rates, routes, and services has been pre-empted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1305(a)(1); that subsection 2.5 of the NAAG Guidelines, which purports to require that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare," conflicts with the Federal Government's regulatory scheme; and that continual threats of enforcement actions by the Defendant attorneys general and others in concert or participating with them would violate the Supremacy Clause of the United States Constitution. The Court determines that granting the requested injunctive relief does not pose an untoward burden on Defendants and, in fact, would be in the public interest.

The Court further finds it unnecessary to decide whether the threatened implementation or enforcement of the NAAG Guidelines through state law by the defendant attorneys general, or by others in concert or participating with them through their respective states' laws, constitutes an undue burden on interstate and foreign commerce in violation of the Commerce Clause; violates the interstate compact clause (Art. I, § 10, cl. 3, U.S. Constitution); or violates Plaintiffs' First Amendment rights. Accordingly, it is

ORDERED that Plaintiffs' Motion for Judgment on the Pleadings, or for Summary Judgment, and for Entry of Final Judgment is GRANTED. It is further

ORDERED that the Attorneys General of the States of

Texas, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, both individually and in their official capacities, their agents, servants, employees, and all other persons acting for the defendants in either capacity, and all other persons acting in concert or participating with the Defendants or on their behalf, and all other persons having actual knowledge of this order be and hereby are permanently enjoined from:

> initiating any enforcement action or actions pursuant to any provision of state law, which would seek to regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations involving their rates, routes and/or services.

It is further

ORDERED that this injunction will operate prospectively only and will not act to interfere with the continuation of the following pending proceedings:

> A. Cause No. 609941, People v. Trans World Airlines, Inc., filed by Attorney General John K. Van De Kamp in the Superior Court of San Diego, California on march 9, 1989. This action was subsequently removed to Federal District Court for the Southern District of California which has since remanded this matter to the San Diego County, California Superior Court.
>
> B. Cause No. 89-41703, People of the State of New York, ex rel Robert Abrams v. Trans World Airlines, Inc., filed by Attorney General Robert Abrams in the New York Supreme Court, New York County, on March 29, 1989. This action was subsequently removed to Federal District Court for the Southern District of New York which has since remanded this matter to the New York County, New York Supreme Court.

C. Cause No. 89-CV-567, State of Kansas, ex rel Robert T. Stephan v. Trans World Airlines, Inc., filed by Attorney General Robert T. Stephan in the District Court of Shawnee County, Kansas, Division 2, on April 3, 1989. This action was subsequently removed to Federal District Court for the District of Kansas which has since remanded this matter to the Shawnee County, Kansas District Court.

D. Cause No. 89 CIV 2425 Pan American World Airways, Inc. v. Robert Abrams, as Attorney General of the State of New York, filed by Pan American World Airways, Inc. in the Southern District Court of New York on April 11, 1989.

E. Cause No. 89-42223, The People of the State of New York, ex rel Robert Abrams v. Pan American World Airways, Inc., filed by Attorney General Robert Abrams in New York Supreme Court, New York County on April 20, 1989. This action was subsequently removed to Federal District Court for the Southern District of New York which has since remanded this matter to the New York County, New York Supreme Court.

It is further

ORDERED that Plaintiffs shall recover of the Defendants the costs of this action.

SIGNED this 1st day of June, 1990.

/s/ Walter S. Smith Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

SELECTED STATE STATUTES

CALIFORNIA BUSINESS AND PROFESSIONS CODE

§ 17200 Unfair Competition; Law Governing

As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with section 17500) of Part 3 of Division 7 of the Business and Professions Code.

§ 17203 Injunction; Orders or Judgments

Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

§ 17500 False or Misleading Statements

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state,

in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised.

FLORIDA STATUTES 1989, CHAPTER 501

501.204 Unlawful Acts and Practices.

(1) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

IOWA STATUTES

Iowa Code section 714.16 (1989)

2. *a.* The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any

merchandise, whether or not a person has in fact been misled, deceived, or damaged is an unlawful practice. . . .

MINNESOTA STATUTES

§ 325F.67 False Statement in Advertisement

Any person, firm, corporation, or association who, with intent to sell or in anywise dispose of merchandise, securities, service or anything offered by such person, firm, corporation, or association, directly or indirectly, to the public, for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, label, price tag, circular, pamphlet, program, or letter, or over any radio or television station, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, for use, consumption, purchase, or sale, which advertisement contains any material assertion, representation, or statement of fact which is untrue, deceptive, or misleading, shall, whether or not pecuniary or other specific damage to any person occurs as a direct result thereof, be guilty of a misdemeanor, and any such act is declared to be a public nuisance and may be enjoined as such.

The duty of a strict observance and enforcement of this law and prosecution for any violation thereof is hereby expressly imposed upon the attorney

general, and it shall be the duty of the county attorney of any county wherein a violation of this section shall have occurred, upon complaint is being made, to prosecute any person violating any of the provisions of this section.

§ 325F.69 Unlawful practices

Subdivision 1. **Fraud, misrepresentation, deceptive practices.** The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided herein.

NEBRASKA STATUTES
TRADE PRACTICES

87-302. Deceptive trade practices; enumerated. (a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

(1) . . .

. . .

(9) Advertising goods or services with intent not to sell them as advertised;

(10) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) . . .

87-303. Deceptive trade practices; damages; injunction; costs; additional remedy. (a) A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. . . .

87-303.05. Attorney General; temporary restraining order; civil action; exceptions. (1) Whenever the Attorney General has cause to believe that a person has engaged in or is engaging in any deceptive trade practice or unconscionable act listed in section 87-302 or 87-303.01, he may apply for and obtain, in an action in any district court of this state, a temporary restraining order, or injunction, or both, pursuant to the rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by such person of any such deceptive trade practice, or which may be necessary to restore to any other person any money or real or personal property which may have been acquired by means of any such practice.

NEW YORK STATUTES
GENERAL BUSINESS LAW

§ 349. Deceptive acts and practices unlawful

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(b) Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm,

corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices states to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.

§ 350. False advertising unlawful

False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

§ 350-a False advertising

The term "false advertising" means advertising, including labeling, which is misleading in a material respect; and in determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

WASHINGTON STATUTES
UNFAIR BUSINESS PRACTICES - CONSUMER PROTECTION

19.86.020 Unfair competition, practices, declared unlawful. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

19.86.080 Attorney general may restrain prohibited acts ---Costs---Restoration of property. The attorney general may bring an action in the name of the state against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful;

. . . .

The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

WISCONSIN STATUTES

100.18 Fraudulent Representations

(1) No person, firm, corporation or association, or agent or employe thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employe thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate,

merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

100.20 Methods of Competition and Trade Practices

(1) Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
} ss.:
COUNTY OF SAN DIEGO }

I am a citizen of the United States and a resident of or employed in the City of San Diego, County of San Diego; I am over the age of 18 years and not a party to the within action; my business address is 110 West A Street, Suite 700, San Diego, California 92101.

On August 1, 1990, I served the within Petition of Thirty-Three Attorneys General for Writ of Certiorari in re: Jim Mattox, Attorney General of Texas, et al. v. Trans World Airlines, Inc., et al., in the Supreme Court of the United States, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at San Diego, California, addressed as follows:

FULBRIGHT & JAWORSKI
RONALD D. SECREST
DAVID WILKS CORBAN
IRENE KOSTURAKIS
1301 McKinney Street, Houston, TX 77010
Attorneys for Respondents Trans World Airlines, et al.

JIM MATTOX
Attorney General of Texas
STEPHEN GARDNER
Assistant Attorney General
714 Jackson, Suite 700, Dallas, TX 75202
Attorney for Petitioner Jim Mattox

All other parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 1990, at San Diego, California.

Julie Velarde
JULIE VELARDE

Subscribed and sworn to before me on August 1, 1990.

Betty A. Hitchingham
BETTY A. HITCHINGHAM, Notary Public

Nos. 90-221 and 90-232

FILED
SEP 20
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JIM MATTOX, ATTORNEY GENERAL OF TEXAS, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the issues presented in the petitions, pertaining to the propriety of preliminary injunctive relief, are now moot in light of the supervening grant of a permanent injunction.

2. Whether section 105(a)(1) of the Airline Deregulation Act of 1978, which bars the states from imposing any regulation "relating to rates, routes, or services of any air carrier," preempts state regulation of air fare advertising.

3. Whether an effort by persons to intervene and secure relief in litigation before a district court constitutes sufficient contact with the forum to subject those persons to jurisdiction for purposes of that litigation.*

---

* The respondents are Trans World Airlines, Inc.; Continental Airlines, Inc.; British Airways PLC; Pan American World Airways, Inc.; Air Canada; Compagnie Nationale Air France; Alitalia-Linee Aeree Italiane, S.p.A.; El Al Israel Airlines Ltd.; Finnair; Lufthansa German Airlines; Japan Air Lines Company, Ltd.; Qantas Airways Ltd.; Scandinavian Airlines System; and Viaçao Aérea Rio-Grandense (VARIG). Their corporate parents and partially owned subsidiaries are listed in Apps. A-N, *infra*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-221 and 90-232

JIM MATTOX, ATTORNEY GENERAL OF TEXAS, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

This brief in opposition is filed on behalf of all respondents.

STATEMENT

1. *The federal regulatory scheme.* Civil aviation has been subject to extensive federal regulation since enactment of the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938). Included among the powers conferred upon the Civil Aeronautics Board ("CAB") by that Act was the authority, now codified in section 411(a) of the Federal Aviation Act, 49 U.S.C. app. § 1381(a), to determine whether an air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of

competition." For many years that authority over consumer protection was shared with the states. *See Nader v. Allegheny Airlines*, 426 U.S. 290 (1976). But subsequent enactment of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), represented "a major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation." S. Rep. No. 631, 95th Cong., 2d Sess. 52 (1978). *See also* H.R. Conf. Rep. 1779, 95th Cong., 2d Sess. 56 (1978) ("this new, comprehensive legislation . . . entirely overhauls the aviation regulatory system").

The purpose of the Deregulation Act was to encourage development of a system of civil aviation that "relies on competitive market forces to determine the quality, variety, and price of air services . . . ." S. Rep. No. 631 at 1; *see also* 49 U.S.C. app. § 1302(a)(9). Section 102(a)(1) of the Act, 49 U.S.C. app. § 1302(a)(7), instructs the CAB to prevent "unfair, deceptive, predatory, or anticompetitive practices . . . that would tend to allow one or more air carriers . . . unreasonably to increase prices, reduce services or exclude competition in air transportation." In turn, section 105(a)(1) of the Act expressly preempts state law: "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." Congress thus chose to eliminate "a confusing system of dual regulation," because "it is important that only one standard of regulation be provided for airlines operating under the authority of the CAB." S. Rep. No. 631 at 98. *See also* H.R. Rep. No. 1211, 95th Cong., 2d Sess. 15-16 (1978).

The Deregulation Act was followed by the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984), which transferred the powers and duties of the CAB to the Department of Transportation ("DOT"). This Act preserved section 105(a)(1) of the

Deregulation Act, with its express statement of federal preemption, and the accompanying House Report explained that preemption was of particular importance in the area of consumer protection:

> In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R. Rep. No. 793, 98th Cong., 2d Sess. 4 (1984). The Report further explained that Congress had chosen to consolidate "CAB's consumer protection and unfair competitive practice authorities" in DOT in order to avoid the conflict or confusion that might result "[i]f two agencies shared authority." *Id.* at 6.

Following enactment of the Sunset Act DOT has continued and expanded upon CAB's regulations in the area of consumer protection. DOT's regulations comprehensively address such matters as advertising; competitive, promotional, and deceptive practices; sales; and notice of terms of contract of carriage. *See* generally 14 C.F.R. §§ 201, 221, 254, 380, 399 (1990). With specific reference to the advertising of air fares, DOT has issued orders providing, for example, that the international departure tax, customs and immigration fees, and surcharges for security services may be identified separately from the base fare. DOT Orders 85-12-68 and 89-4-25. 4 R. Ex. 5 ("R" refers to the multi-volume record on appeal); Appellees Br. at A33-35 (No. 89-1142 5th Cir.). Moreover, in publishing notice of proposed regulations, DOT has affirmed that section 105(a)(1) of the Deregulation Act protects carriers against potentially conflicting regulation of air fare advertising by the 50 states and dictates "that there be one industry-wide price advertisement standard." 54 Fed. Reg. 31052, 31054 (1989).

2. *The events leading to this litigation.* In September, 1987, the National Association of Attorneys General ("NAAG") circulated proposed Air Travel Industry Enforcement Guidelines, including proposed uniform state rules governing air fare advertising, to carriers, DOT, and the Federal Trade Commission ("FTC") for comment. The Guidelines provided, *inter alia*, "that any fuel, tax or other surcharge to air fare must be included in the total advertised price of the fare." Texas Pet. App. 3a ("Texas Pet." refers to the petition in No. 90-221).

The FTC and DOT both strongly opposed adoption of the Guidelines. The FTC pointed out that the Guidelines, "especially the advertising provisions, could have the unintended consequence of substantially inhibiting effective price competition," that they "might result in inconsistent federal and state regulation," and that they "ignore[] the important question of federal preemption." 4 R. Ex. 2. DOT also objected to the Guidelines on their merits and commented further that they "appear to be preempted by the Federal Aviation Act (49 U.S.C. § 1301 *et seq.*), or [DOT] rules or would unduly burden interstate commerce . . . ." 4 R. Ex. 8 at 1. Notwithstanding this federal opposition, NAAG adopted the Guidelines in December, 1987. Texas Pet. App. 3a.

In February, 1988, the attorneys general of Texas and six other states circulated a memorandum announcing that they intended to "bring airline advertisements into compliance with standards delineated in the [NAAG] guidelines for fare advertising." 2 R. Ex. H, Attachment A. DOT responded by stating that "we have specifically permitted the type of advertising to which the Attorneys General object" and repeating that "the federal government has preempted this aspect of state price advertising regulation." 4 R. Ex. 9 at 1. Undeterred, the attorneys general of Texas and four other states sent letters in November, 1988, to respondents Trans World Airlines, Inc. ("TWA"), Continental Airlines, Inc. ("Continen-

tal"), and British Airways PLC ("British Air"), "notifying them that some of their advertisements violated the NAAG guidelines and these states' false advertising and deceptive practices laws . . . [and] charg[ing] that the airlines had attempted to make their fares appear lower than those of their competitors by prominently advertising the ticket price, while less prominently disclosing taxes, surcharges and fees." Texas Pet. App. 3a. "The letter threatened prosecution." *Id.*

3. *Litigation in the district court.* Faced with this threat, TWA, Continental, and British Air brought suit against the Attorney General of Texas in the United States District Court for the Western District of Texas, seeking to enjoin him from enforcing the Texas Deceptive Trade Practices Act against their fare advertising. They moved for a temporary restraining order ("TRO") and the court held a hearing on the motion. On the day of the hearing, the attorneys general of 33 states (not including Texas) filed a motion requesting an order denying a TRO or, in the alternative, a postponement of the hearing. *Id.* at 29a. The Attorney General of Kansas participated in the hearing, explaining that he appeared on behalf of all of the attorneys general who had filed that motion. *Id.* at 30a.

Following the hearing, the district court determined that the plaintiffs had established a likelihood of success on the merits and also had satisfied the other requirements for preliminary injunctive relief. *Id.* at 41a-42a. Accordingly, the court "issued the preliminary injunction prohibiting the Attorney General of Texas from initiating any enforcement action to regulate the [plaintiffs'] advertising of fares." *Id.* at 30a. The Attorney General of Kansas then filed a motion to clarify the injunctive order. *Id.* The court granted the motion, making explicit that the preliminary injunction "does not apply to any Attorney General of any state, commonwealth, territory, or the District of Columbia, other than

Jim Mattox, Attorney General of Texas, nor does that order apply to any law other than the laws of the State of Texas." *Id.* at 31a.

Subsequently, TWA, Continental, and British Air moved to broaden the preliminary injunction to cover the 33 attorneys general who had intervened *de facto* as defendants in order to oppose the request for a TRO, and ten additional respondent airlines here moved for leave to intervene as plaintiffs. The district court granted both motions on April 26, 1989. *Id.* at 44a-59a. On May 26, 1989, the court permitted the remaining respondent airline here, Pan American World Airways, Inc., also to intervene as a plaintiff. *Id.* at 60a-61a.

All 34 attorneys general appealed from issuance of the preliminary injunction.

4. *The Fifth Circuit's opinion.* The court of appeals affirmed, agreeing that "state laws pertaining to deceptive advertising have been expressly preempted by federal law when applied to fare advertising by interstate and international airlines." *Id.* at 13a.

The court began by noting that section 105(a)(1) of the Deregulation Act preempts all state laws "relating to rates, routes, or services," and that this Court has held that a state law "relates to" a subject, as that term is used in a preemption statute, if it "has a connection with or reference to" the subject. *Id.* at 15a (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983)). The court further noted that the Seventh Circuit earlier had concluded that "[p]ricing advertising surely 'relates to' price" and that other courts had reached similar conclusions concerning the reach of section 105(a)(1). *Id.* at 15a-18a (citing *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990); *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989); *O'Carroll v. American Airlines, Inc.*, 863

F.2d 11 (5th Cir.), *cert. denied*, 109 S. Ct. 3158 (1989); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987); and *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984)).

The court then reviewed the legislative history of section 105(a)(1) and determined that it "demonstrates the intent of Congress to expressly preempt state regulation of airline fare advertising, leaving no right of action that arises under state law only." *Id.* at 21a. In addition, "[s]ubsequent legislation has confirmed the intent of Congress to preempt state regulation of airline fare advertising." *Id.* at 22a. The court concluded:

> Given the history of congressional concern and the inclusion of specific preemption language in the Deregulation Act, we agree with the Seventh Circuit in *Illinois Corporate Travel* that airline fare advertising "relates to" rates within the meaning of § 1305(a)(1). Although the state laws against deceptive advertising are not aimed specifically at airlines, and clearly do not attempt to set rates, the conclusion is inescapable that such laws do "relate to" rates when applied to airline fare advertising. As the Supreme Court noted in *Shaw*, a law relates to a particular subject "if it has a connection with or reference to" that subject. It cannot be gainsaid that enforcement of a state law regulating fare advertising by airlines has a connection with or reference to rates within the meaning of § 1305(a)(1). Therefore, such state action is expressly preempted by § 1305(a)(1).

Id. at 23a (citation omitted). Consequently, "the airlines have demonstrated a substantial likelihood of success on their claim for a permanent injunction." *Id.* at 25a. The court determined that the other requirements for issuance of a preliminary injunction also had been satisfied. *Id.* at 25a-27a.

The court further held that "the thirty-three attorneys general became *de facto* intervenors when the Attorney

General of Kansas filed the motion, sought relief and participated in the TRO hearing on their behalf . . . [and thus] waived any objection to the jurisdiction of the court over their persons as representatives of their respective states." *Id.* at 34a.

5. *Entry of final judgment.* After the Fifth Circuit affirmed the award of preliminary relief, the district court issued a permanent injunction and entered final judgment on June 1, 1990. *Id.* at 62a-67a. The petitioners' appeal from that judgment currently is pending in the Fifth Circuit. *See Mattox v. Trans World Airlines, Inc.*, No. 90-8387 (5th Cir.).

ARGUMENT

1. *Issues pertaining to the propriety of preliminary injunctive relief are now moot.* This case arises from the issuance of a preliminary injunction. Following affirmance by the Fifth Circuit, the district court issued a permanent injunction and entered final judgment. The order granting preliminary relief now has merged into the order granting permanent relief, and questions pertaining to the propriety of the earlier order have become moot. *See Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 588-89 (1926); *Shaffer v. Carter*, 252 U.S. 27, 44 (1920).

Petitioners argue that the Fifth Circuit, in ruling on their pending appeal from the final judgment, will simply adhere to its holding in this case respecting the preemptive effect of section 105(a)(1) of the Deregulation Act. *See* Texas Pet. 6-7 n.1; 33 Pet. 11 n.5 ("33 Pet." refers to the petition in No. 90-232). This overlooks the fact that the issues now before the Fifth Circuit are subtly different from those decided in this case: "whether the preliminary injunction should have issued depended on the balance of factors listed in *Canal Authority* [*of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974)], while [the propriety of permanent relief] depends on a final resolution of the merits." *University of Texas v.*

Camenisch, 451 U.S. 390, 393 (1981). We nevertheless agree that the Fifth Circuit can be expected to adhere to its prior holding with respect to preemption: petitioners have introduced no evidence and developed no argument to suggest that the holding should not extend to the award of permanent relief.

This does not mean, however, that mootness should be disregarded on grounds of expediency, merely because the questions petitioners wish to present may soon become ripe for consideration by this Court in any event. The doctrine of mootness has a practical value in cases precisely such as this. Petitioners could have sought review of the permanent injunction in this Court by filing a petition for a writ of certiorari before judgment. *See* 28 U.S.C. § 1254(1). They have chosen, instead, to take a second bite from the apple in the Fifth Circuit. They are entitled to do so, but they should not expect this Court to permit them to conduct parallel litigation in this Court and the Fifth Circuit. "[T]he only question before [this Court]—the correctness of the decision to grant a preliminary injunction—is moot," *Camenisch*, 451 U.S. at 394, and the very purpose of the doctrine of mootness in this context is to prevent parallel litigation over preliminary and permanent injunctive relief.

2. *Section 105(a)(1) of the Deregulation Act preempts state regulation of air fare advertising.* The Fifth Circuit's holding with respect to preemption is correct. There is no reason for this Court to grant review.

a. Section 105(a)(1) preempts all state laws "relating to rates, routes, or services of any air carrier." The phrase "relating to," as used in federal preemption statutes, must be given a "broad common-sense meaning." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). A state law "relates to" a subject "if it has a connection with or reference to" that subject. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). *See also, e.g.*,

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985); *Blue Cross & Blue Shield of Florida, Inc. v. Department of Banking and Finance*, 791 F.2d 1501, 1504-05 (11th Cir. 1986); *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). As the Seventh Circuit also has concluded, state laws regulating the advertising of air fares plainly have a connection with or reference to rates. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990). Such state laws, therefore, are preempted by section 105(a)(1).

The legislative history confirms this conclusion. Prior to 1978, the CAB and the states had shared responsibility over consumer protection. *See Nader*, 426 U.S. at 300-01. The enactment during that year of section 105(a)(1) was intended, among other things, to eliminate this "confusing system of dual regulation," S. Rep. No. 631 at 98, and to "prevent conflicts and inconsistent regulations." H.R. Rep. No. 1211 at 16. "Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found. v. Massachusetts Port Auth.*, 833 F.2d 157, 173 (1st Cir. 1989).

When Congress later transferred the CAB's powers over consumer protection to DOT, it explained that "[i]n addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states," thereby leaving air carriers free from "confusing and burdensome" state regulation. H.R. Rep. No. 793 at 4. This view of a subsequent Congress concerning the meaning of a previously enacted statute has "significant weight," *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980), especially where, as here, "Congress is not merely expressing an opinion on a matter which may come before a court but is acting on what it understands its own prior acts to mean."

Mount Sinai Hosp. v. Weinberger, 517 F.2d 329, 343 (5th Cir. 1975).

Moreover, DOT repeatedly has taken the position that its authority over consumer protection preempts state laws of the kind that petitioners are seeking to enforce. Indeed, to the extent that those state laws are fairly represented by the NAAG Guidelines, they are directly contrary to the position that DOT has announced concerning the separate identification of taxes, fees, and surcharges in fare advertisements. *See* pp. 3-4, *supra*. For all these reasons, the Fifth Circuit correctly concluded that section 105(a)(1) preempts state efforts at regulating air fare advertising.

b. The decision below does not conflict with the decisions either of this Court or of the other courts of appeals. Although petitioners attempt to suggest otherwise, the decision below obviously is consistent with *Nader*. In that case, this Court held that the CAB's authority to regulate consumer protection under section 411(a) of the Federal Aviation Act was not exclusive in the absence of any provision in that Act expressly preempting state law. The decision in this case turns on section 105(a)(1) of the Deregulation Act, which was enacted two years *after* the decision in *Nader* and *does* expressly preempt state law. The Deregulation Act, with its express preemption of state law, fundamentally redirected and entirely overhauled the regulatory scheme under which *Nader* had been decided. This case and *Nader* thus involve different issues arising under different statutes with different regulatory objectives.

The decision below also is consistent with both *Alaska v. Department of Transp.*, 868 F.2d 441 (D.C. Cir. 1989), and *Air Transport Ass'n v. Public Util. Comm'n*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988), the two federal appellate decisions on which petitioners rely in asserting a conflict. The decision in *Alaska*

did not involve section 105(a)(1) and, indeed, had nothing whatsoever to do with preemption; the question there concerned only the procedural validity of certain administrative orders. Preemption was at issue in *Air Transport*; the court held that a state regulation forbidding surreptitious eavesdropping on telephone conversations was unrelated to airline rates, routes, or services and therefore was not preempted by section 105(a)(1). That regulation obviously was far removed from the regulation of air fare advertising at issue in this case.

More recently, the Ninth Circuit has held that a passenger may sue an air carrier under state law for damages resulting from overbooking, reasoning that section 105(a)(1) does not "encompass all state laws that affect airline services, however tangentially." *West v. Northwest Airlines, Inc.*, No. 89-35820, slip op. (9th Cir. Sept. 11, 1990). But the Ninth Circuit has not decided a case involving state regulation of air fare advertising, nor has it said anything to indicate that it disagrees with the decisions of the Fifth and Seventh Circuits on this issue.

Absent a conflict, this case does not warrant plenary review. The Attorney General of Texas argues that "[t]he effect of the injunction is to prohibit the filing of any additional lawsuits by any state, whether in state or federal court." Texas Pet. 7 n.2. At one point the non-Texas petitioners enlarge upon this argument, claiming that the scope of the injunction was overbroad. 33 Pet. 17-19. But the argument, which was not made below, clearly is mistaken and quite possibly is not even seriously intended. As the non-Texas petitioners elsewhere correctly point out, "[s]ixteen states are not covered by the injunction . . . [and] [n]umerous airlines are not parties to th[is] litigation and are not covered by the injunction." 33 Pet. 13. There is, thus, ample opportunity for further consideration of this question of preemption in the lower courts.

There is little reason to fear, however, that the lower courts will be overburdened by a groundswell of litigation involving this question. Petitioners have identified only five such cases pending in federal and state trial courts, and three of those have now been dismissed. *See* Tex. Pet. App. 65a-66a. For the present, consideration of the question presented here may be safely left to the lower courts. "Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., respecting denial of certiorari).

3. *The district court properly exercised jurisdiction over the non-Texas petitioners.* The attorneys general of 33 states entered this litigation voluntarily and of their own accord. They were under no compulsion to do so:

> the plaintiffs filed suit only against the Attorney General of Texas. Although they sought a TRO against the defendant and "any person in active concert or participation with him," the only relief prayed was from enforcement actions "under the laws of the state of Texas." The complaint and motion for an injunction did not seek to enjoin the enforcement of any laws but those of Texas.

Texas Pet. 33a. Nonetheless, the non-Texas petitioners, behaving like named parties, rushed into court filing a motion, seeking relief, and participating in argument. This is not a case, like *Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990), involving an absent defendant; the non-Texas petitioners were present and active in court.

Although the non-Texas petitioners did not expressly waive objections to personal jurisdiction, neither did they expressly assert such objections. They claim now that they "contested" jurisdiction, but that is wrong; they simply sought relief "without admitting that this Court has personal jurisdiction over them." Texas Pet. App. 29a. They were precluded from contesting jurisdiction,

for they were "ask[ing] the court to act on [their] behalf in some substantive way." 33 Pet. 27.

In these circumstances, there was ample factual basis for the Fifth Circuit's determination that the non-Texas petitioners intervened *de facto* and thus subjected themselves to the personal jurisdiction of the district court. *See, e.g., In re Grand Jury Proceedings*, 654 F.2d 268, 271 (3d Cir.), *cert. denied*, 424 U.S. 1098 (1981); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979). This essentially factual question is *sui generis* and does not warrant further review.

The non-Texas petitioners' related claim, that there was no subject-matter jurisdiction or justiciable case or controversy, is frivolous. There was of course subject-matter jurisdiction, for respondents' claim was based on a federal statute. *See* 28 U.S.C. § 1331.

There also was a case or controversy. It is undisputed that respondents' advertising violates the NAAG Guidelines, which the attorneys general treat as expressive of state law. In this context, the non-Texas petitioners' precipitate entry into the case, with their demand that they be left free to "enforce[] . . . their state law in their state court," Texas Pet. App. 30a, adequately demonstrated the existence of a "real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945). Respondents were not "without some reason in fearing prosecution," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979), and did not have to "await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

TRANS WORLD AIRLINES, INC.

Parent Company

TWA Airlines, Inc.

Subsidiaries (Except Wholly Owned Subsidiaries)

Airline Data Resources, Inc.
Airport Cargo Services, Inc.
Airport Terminal Services, Inc.
Ambassador Fuel Corporation
Ambassador Health Systems, Inc.
Blue Jay Investors Plan, Inc.
Elsinore Investment Services, Inc.
Elytron, Inc.
International Aviation Security, Inc.
Midcoast Aviation, Inc.
Midcoast-Little Rock, Inc.
Northwest 112th Street Corp.
Ozark Group, Inc.
Storm Haven, Inc.
Swan Management Corp.
The Getaway Group (U.K.), Inc.
The Travel Channel, Inc.
The TWA Ambassadors Club, Inc.
Transcontinental & Western Air, Inc.
Trans World Airlines (Australia) Pty. Ltd.
Trans World Airlines Services, Inc.
Trans World Computer Services, Inc.
Trans World Pars, Inc.
TWA America, Inc.
TWA Aviation, Inc.
TWA de Mexico, S.A., de C.V.
TWA Employee Services, Inc.
TWA Getaway Vacations, Inc.
TWA Group, Inc.

TWA International, Inc.
TWA Investment Plan, Inc.
TWA Maintenance Services, Inc.
TWA Nippon, Inc.
TWA Standards & Controls, Inc.
TWA-U.S., Inc.
World Marketing Services, Inc.

APPENDIX B

CONTINENTAL AIRLINES, INC.

Parent Company

Continental Airlines Holdings, Inc.

Subsidiaries (Except Wholly Owned Subsidiaries)

Bar Harbor Airways, Inc.
Continental—Eastern Sales, Inc.
TAC/SAS Quality Service Institute, Inc.

APPENDIX C

BRITISH AIRWAYS PLC

Parent Company

None

Subsidiaries *

Air Mauritius Ltd.
ALTA Holidays Ltd.
Anchorage Fueling and Servicing Company
Bedford Associates, Inc.
Britair Acquisition Corp.
British Air Holidays Ltd.
British Airways Associated Companies, Ltd.
British Airways Engine Overhaul Ltd.
British Airways Enterprises Ltd.
British Airways Tour Operations
British Caledonian Flight Training
British Caledonian Group PLC
Caledonian Airways Limited
Covia Partnership
Distribution Systems Inc.
Hogg Robinson PLC
Penta Hotels NV
Overseas Air Travel Ltd.
Ruby Aircraft Leasing and Trading
Sabena World Airlines NV
Sapphire Aircraft Leasing and Trading
Speedbird Insurance Company Ltd.
The Galileo Company Limited
The Plimsoll Line Ltd.
Travel Automation Services Ltd.

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* Does not include companies with less than 5% British Airways PLC Ownership.

APPENDIX D

PAN AMERICAN WORLD AIRWAYS, INC.

Parent Company

Pan Am Corporation

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio, Inc.
Air Cargo, Inc.
Airline Tariff Publishing Company
Escola Americana de Rio de Janeiro
Honolulu Fueling Facilities Corporation
International Aeradio (Caribbean) Ltd.
Liberian Development Corporation
Manhattan Air Terminal, Inc.
Nigerian Aviation Handling Co.
Promotora de Hoteles de Turismo Medellin, S.A.
Social Immobiliara Norteamericana, S.A.
Société International de Telecommunications Aeronautiques

APPENDIX E

AIR CANADA

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Air B. C. Limited
Air Nova Inc.
Express Messenger Systems Inc.
Global Travel Computer Holdings Ltd.
Matac Cargo Limited
Northern Express Messenger Systems Ltd.
PCL Courier Holdings Inc.
152160 Canada Inc.

APPENDIX F

COMPAGNIE NATIONALE AIR FRANCE

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Air Charter
Euroberlin France
Saresco (Société Aéroportuaire de Restauration, de Services et de Commerces)
Servair (Compagnie d'Exploitation des Services Auxiliaires Aériens)
Société Immobilière Aéroportuaire
Sodexi
Sotair (Société de Tourisme Aérien International)

APPENDIX G

ALITALIA-LINEE AEREE ITALIANE, S.p.A.

Parent Company

Istituto per la Ricostruzione Industriale (IRI)

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeroporti di Roma—Societa per la Gestione del Sistema Aeroportuale della Capitale S.p.A.
Aligame S.p.A.
Italiatour S.p.a.
Racom Teledata S.p.A.
Sigma—Societa Italiana Gestione Sistema Multi Accesso per Azioni
Sigma Travel System S.p.A.
Sisam S.p.A.

APPENDIX H

EL AL ISRAEL AIRLINES LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

None

APPENDIX I

FINNAIR

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Airplus Company Ltd.
Asunto Oy Heikkiläntalo
Asunto Oy Iso-Roobertinkatu 3-5-7
Asunto Oy Mannerheimintie 100
Asunto Oy Metsätorppa, Kauppalantie 48
Asunto Oy Octavus, Mannerheimintie 84
Asunto Oy Tenholantie 4
Finlandia Travel Agency Ltd.
Finnaviation Oy
Finnish American International Trade Inc.
Finnland Haus GmbH
Infa-Hotel
Kar-Air Ab
Karair Oy
Matkatoimisto Matkayhtyma Oy
Oy TEN-MAR Fastighets Ab
Suomen Matkatoimisto Oy

APPENDIX J

LUFTHANSA GERMAN AIRLINES
(Deutsche Lufthansa Aktiengesellschaft)

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

DLT Deutsche Luftverkehrsgesellschaft mbH

APPENDIX K

JAPAN AIR LINES COMPANY, LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Global Laundry & Linen Supply, Inc.
Global Real Estate
Hotel Nikko Saipan, Inc.
International Inflight Catering Company
JAL International Service, Inc.
Jet Fresh, Inc.
Lanovac, Inc.
Nikko Inflight Catering Company
Pacific Business Base
Pacific Fuel Trading Corp.
Pacific World Corporation
Pan Pacific Hoteliers
Tropical Plaza, Ltd.

APPENDIX L

QANTAS AIRWAYS LTD.

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

Aeronautical Radio Thailand Limited
Air Pacific Limited
Fiji Resorts Limited
Gateway Passenger Services, Inc.
Global Logistics Services Pty. Limited
Honolulu Fueling Facilities Corporation Inc.
Jupiter Air (Australia) Pty. Limited
Laxfuel Corporation
Los Angeles West Terminal Fuel Corporation
Official Filing Company
QHF Insurance Brokers Limited
Société Internationale de Telecommunications Aeronautiques
Thomas Cook Pty. Limited
Tradegate Australia Limited
Travel Industries Automated Systems Pty. Ltd.

APPENDIX M

SCANDINAVIAN AIRLINES SYSTEM (SAS)*

Parent Company

None

Subsidiaries (Except Wholly Owned Subsidiaries)

A. Giele & Sohne (GmbH & Co.)
Airlines of Britain Holdings PLC
Amadeus A.G.
Amadeus Global Travel Distribution S.A.
Aviation Holdings PLC
Bennett Rejsebereu
Bromma Tryck AB
Continental Airlines Holdings, Inc.
Copenhagen Airline Catering A/S
Copenhagen Duty-Free Distribution A/S
Copenhagen International Hotels K/S GH
CSG Catering Service GmbH & Co.
Diners Club Danmark A/S
Diners Club Finland OY
Diners Club Nordic A/S
Diners Club Norge A/S
Diners Club Sweden AB
Gronlandsfly A/S
Hotel Scandinavia K/S
Hoteles Sunwing SA
Hoteles Vacatio SA
Inflight Services International Ltd.
Inversas Ltda.

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* The SAS Group is made up of the SAS Consortium and its subsidiaries and affiliated companies. The SAS Consortium was formed by the three national airlines of Denmark, Norway, and Sweden: Det Danske Luftfartseiskab A/S (DDL), Det Norske Luftfartseiskap A/S (DNL), and AB Aerotransport (ABA), respectively. The subsidiaries listed in this appendix are the subsidiaries and affiliated companies of SAS.

Kobenhavns Lufthavns Forretningscenter K/S
Lan Chile S.A.
Nord-Norsk Hotelldrift A/S
Norwegian Showcase (USA) A/S
Oslo Airline Catering A/S
Polygon Insurance Co. Ltd.
Saga Solraiser A/S
Saison Overseas (Holdings) BV
SAS Capital BV
SAS Globetrotten Hotel S/S
SAS Grand Hotel Beijing, Joint Venture Co. Ltd.
SAS Holding A/S
SAS Hotels A/S Danmark
SAS Hotels Brussels S.A.
SAS Hotels (Deutschland) GmbH
SAS Hotels N.V.
SAS Hotels U.K., Ltd.
SAS International Hotels A/S
SAS Leisure AB
SAS Park Avenue Hotel AB
SAS Park Royal Hotel A/S
SAS Scandinavia Hotel A/S
SAS Service Partner AB, Sverige
SAS Service Partner A/S
SAS Service Partner A/S, Norge
SAS Service Partner GmbH & Co.
SAS Service Partner Holding GmbH Deutschland
SAS Service Partner Holdings Ltd.
SAS Service Partner Ltd.
SAS Service Partner Offshore & Industrial Catering A/S
SAS Service Partner Offshore Catering Stavanger A/S
SAS Trading Holding A/S
Scandinavia Aero Engine Services AB
Scandinavian Aviation Investments Ltd.
Scandinavian Multi Access Systems AB
Smart Sverigt AB
Spanair S.A.
Stockholm Airline Catering AB

Stockholm Airport Restaurants AB
Sunet SA
Sunwing AB
Sunwing Hellas SA
Swedair AB
Tenerife Sol SA
Tenk SA
Travel Management Group, Sweden AB
Ucak Servisi AS
VHH Vereinigte Hotel-Holding GmbH
Vingreiser A/S
Vingreiser Norge A/S
Wideroe's Flyveselskap A/S

APPENDIX N

VIAÇAO AÉREA RIO-GRANDENSE (VARIG)

Parent Company

Fundaçao Ruben Berta

Subsidiaries (Except Wholly Owned Subsidiaries)

Agripec S.A. Agropecuária Ind. Com. Exportação
BANCO VARIG S.A.
Cia. Tropical de Hotéis
Cia. Tropical de Hotéis da Amazônia
Cia. Tropical de Hotéis do Nordeste
Cia. Tropical—Hotel Tambaú
Expressão Brasileira de Propaganda, Ltda.
Hotel de Bahia S.A.
Icaro Editora, Ltda.
Interlocadora S.A.
Rio-Sul Serviços Aéreos Regionais S.A.
Serviços Auxiliares de Transporte Aéreo S.A.
Sociedade Brasileira de Turismo Aéreo—"ROTATUR", Ltda.
Varig S.A. Arrendamento Mercantil
Varig Trading S.A.

Supreme Court, U.S.
FILED
SEP 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

(4) (4)

Nos. 90-221 and 90-232

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JIM MATTOX, ATTORNEY GENERAL OF TEXAS, *et al.*,
Petitioners,
v.
TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Nos. 90-221 and 90-232

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JIM MATTOX, ATTORNEY GENERAL OF TEXAS, *et al.*,
Petitioners,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

Petitioners respectfully respond to two points raised in the airlines' Brief in Opposition filed herein.

A Clear Conflict of Circuits Exists

An additional reason for granting a writ of certiorari now exists. On September 11, 1990, the United States Court of Appeals for the Ninth Circuit issued its opinion in *West v. Northwest Airlines, Inc.*, Appendix to Reply at 1a. The Ninth Circuit held that Section 105 of the Federal Aviation Act preempts claims based on state law "only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an effect on airline services are not preempted." *Id.*, Appendix to Reply, at 6a-7a.

This holding of the Ninth Circuit is in clear conflict with the interpretation of Section 105 upon which the Fifth Circuit based its holding in this case. The Ninth Circuit does not discuss the Fifth Circuit's opinion. It does, however, cite as authority *People of State of New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162 (S.D.N.Y. 1990). The district court there was aware of the district court's holding in this case and did not follow it. *Id.*, 728 F.Supp. at 166-167.

The airlines' Brief in Opposition attempts to deny the significance of this case by arguing that *West* can be disregarded because the holding of the Ninth Circuit did not involve airline advertising. Brief in Opposition at 12. This is neither a distinction nor a difference. The airlines ignore the fact that the injunction at issue in this case itself involves much more than airline advertising. Both

the preliminary and the permanent injunctions issued by the district court restrain the states from initiating any enforcement actions pursuant to state law "which would *seek to regulate or restrict any aspect of the individually named Plaintiff airlines'* air fare advertising or their other *operations involving their* rates, routes, and/or *services.*" Appendix at 65a [emphasis added]. In addition, one case cited by the *West* court did in fact involve state regulation of airline advertising. *People of State of New York ex rel. Abrams, supra.*

The issues in the case before the Court fall squarely within the reasoning and holding of *West.* The *West* opinion is in clear conflict with the Fifth Circuit's opinion and gives even greater reason for this Court to review this case.[1]

Review of This Case is Proper at This Time

The States asked this Court to review this matter before the Fifth Circuit rules on the permanent injunction because the Fifth Circuit is required, by its own procedural precedent, to adhere to the determination of preemption contained in the opinion of which this Court's review is now sought. Petition at 6.

The airlines urge this Court to deny review at this time, because the preliminary injunction on which the Fifth Circuit ruled has now been replaced

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1 The *West* court also discussed and rejected implicit and conflict preemption. Although the Fifth Circuit limited its preemption finding to explicit preemption, *West* stands for the proposition that the state laws at issue here are not preempted in any way.

by an identical permanent injunction. Brief in Opposition at 8.

As the airlines concede, this Court may, at this time, take jurisdiction of the permanent injunction appeal now pending at the Fifth Circuit. 28 U.S.C. § 1254(1) and Brief in Opposition at 9.

The States have no desire for "a second bite from the apple in the Fifth Circuit," as the airlines posit. Brief in Opposition at 9. That apple has been chewed to the core at the Fifth Circuit. The States instead desire that their efforts to enforce their separate state laws not be further delayed simply to await a known result.

If this Court grants certiorari, it would be appropriate for it also to assume jurisdiction over the case now pending in the Fifth Circuit.[2]

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2 The brief for the states is due in the Fifth Circuit on October 1. The brief for the airlines is due on approximately November 1, depending on service of the states' brief. Any reply brief from the states is due on approximately November 16. No oral argument has been scheduled.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted at this time.

Respectfully submitted,

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APPENDIX
TO
REPLY

William D. WEST,
Plaintiff-Appellant,

v.

NORTHWEST AIRLINES, INC.,
Defendant-Appellee

No. 89-35820

United States Court of Appeals for the Ninth Circuit

September 11, 1990

Appeal from the United States District Court for the District of Montana.

Before Procter HUG, Jr., Dorothy W. NELSON, and Melvin BRUNETTI, Circuit Judges.

OPINION

NELSON, Circuit Judge:

Plaintiff-appellant, William D. West (West) purchased a ticket to travel on Northwest Airlines, Inc., (Northwest) from Great Falls, Montana to Arlington, Virginia. Northwest overbooked West's flight and refused to allow West to board the plane. West brought this action against Northwest for breach of the covenant of good faith and fair dealing under Montana law. The district court

granted summary judgment for Northwest on the ground that West's claim was preempted by the Federal Aviation Act. We reverse and remand to the district court to determine if West has a meritorious claim under Montana law.

FACTUAL AND PROCEDURAL BACKGROUND

On September 3, 1986, William D. West purchased a non-refundable, non-changeable ticket to travel on Northwest from Great Falls, Montana to Arlington, Virginia. His flight was scheduled to depart Great Falls at 1:30 p.m. and to arrive in Arlington at 9:00 p.m. on October 7, 1986. West confirmed his scheduled departure with his travel agent on October 6, 1986.

Between the date of purchase and the scheduled departure date, Northwest decided to reduce the size of its aircraft from a Boeing 727, which carries 146 passengers, to a DC 9 aircraft, which carries 78 passengers. Northwest did not inform West or any of Northwest's sales agents of its decision.

When West arrived at the check-in gate, a Northwest employee informed him the flight was overbooked. Northwest attempted to make room for West and other passengers by requesting volunteers to deplane in exchange for certain payments. However, only three people accepted, and West could not obtain a seat on this flight.

Northwest then offered West an alternative flight that would arrive at Dulles Airport, which is

near West's destination, at 3:00 a.m. the next morning. West declined this alternative flight because of its inconvenience and rescheduled his flight to Arlington for approximately two weeks later. West subsequently filed claims in state court for breach of the covenant of good faith and fair dealing under Montana law and for unjust discrimination under section 404(b) of the Federal Aviation Act (FAA). Northwest successfully petitioned the United States District Court to remove the case to the federal court on the basis of diversity of citizenship.

Northwest then moved for summary judgment on the grounds that Section 404(b), upon which West based his federal claim, had expired and that West's state claim was preempted by the FAA. On September 28, 1989, the district court granted Northwest's motion for summary judgment on both of the above grounds.

West timely appealed only the issue of whether the district court erred in dismissing West's state law claim on the ground that it was preempted by the FAA.

DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo to determine, viewing the evidence in the light most favorable to the nonmoving party, whether there existed any genuine issue of material fact and whether the district court correctly applied the

relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

II. Federal Preemption

Northwest argues that the federal government's role in regulating the air transportation industry under the FAA preempts Montana's common law duty to deal fairly and in good faith. In examining this issue, we note that when Congress legislates in a field traditionally occupied by the states, such as common law tort and contract remedies in business relationships, there is a presumption against finding pre-emption of state law. *See California v. ARC America Corp*, 109 S. Ct. 1661, 1665 (1989) (internal quotations omitted).

There are three ways in which preemption may occur. "Congress may preempt state law expressly by so stating in explicit terms on the face of the statute." *Motor Vehicle Mfrs. Ass'n v. Abrams*, 899 F.2d 1315, 1318 (2nd Cir. 1990) (internal quotations omitted). Second, "when Congress intends that federal law occupy a given field, state law in that field is pre-empted." *ARC America Corp*, 109 S. Ct. at 1665. Finally, even if Congress has not occupied the field, "state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible." *Id.*

A. Explicit Preemption

The district court found that Congress in the FAA expressly preempted West's state law claims. Specifically the court held that in section 1305(a)(1), "Congress intended to preempt all state statutes and common law rules which affect rates or services involving air travel." We disagree, finding that Congress did not expressly preempt West's state law claim.

Section 1305(a)(1) of the FAA provides that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to rates, routes, or services* of any air carrier." 49 U.S.C. § 1305(a)(1) (App. Supp. V 1987) (emphasis added).

Appellant asserts first that section 1305 does not apply because "services" does not include airline boarding practices but is limited in meaning to a description of the types of operations which airlines offer, such as scheduled passenger service, scheduled cargo service, mail service and other specialized services. Thus, under West's reading, section 1305 would preempt state law only when the state law affected the types of services offered. We reject this interpretation.

"The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used." *Hughes Air Corp. v. Public Utilities Com'n*, 644 F.2d 1334, 1337 (9th Cir. 1981); *Watt v. Alaska*, 451 U.S. 259, 265 (1981).

In this case, we believe that the plain meaning of "services" clearly includes services provided to customers such as the boarding services at issue here. If Congress had intended to limit the word "services" to something other than its common usage, it could easily have used the words "types of services" rather than "services".

Moreover, the Ninth Circuit has already rejected West's definition of services in *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984). In *Hingson* the court held that regulation of air carrier seating policies involved regulation of services within the meaning of section 1305(a)(1). *Id.* Thus, the court did not define "services" as merely types of services such as cargo or air ambulance but defined it to include services to customers. Following *Hingson*, we find that Northwest's passenger services, including boarding, are airline services within the meaning of section 1305.

However, while we agree with Northwest that "services" include boarding policies, we disagree with Northwest and the district court that "law[s] . . . relating to airline services" encompasses all state laws that affect airline services, however tangentially. This interpretation of § 1305(a)(1) would unduly expand preemption and ignore our presumption against federal preemption in this traditional state law area. Instead, we find that Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim

arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted. *See People of State of N.Y. ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F. Supp. 162 (S.D.N.Y. 1989).

Our analysis is consistent with Ninth Circuit case law. In *Hingson*, a blind person who was not permitted to sit in certain seats during a Pacific Southwest Airlines (PSA) flight brought suit against PSA. Hingson alleged intentional infliction of emotional distress and a claim arising under California Civil Code Section 54.1, which required that handicapped person be given "full and equal access" to accommodations of all airplanes. *Hingson*, 743 F.2d at 1411, 1415. The Ninth Circuit held that Hingson's claims under California Civil code Section 54.1 were preempted by section 1305(a)(1). The court reasoned that Section 54.1 was a regulation directly relating to services within the meaning of Section 1305(a)(1). *Id.* at 1415. The court, however, held that Hingson's claim for intentional infliction of emotional distress was not preempted. *Id.* This decision is consistent with our reading of section 1305(a)(1). Hingson's emotional distress claim did involve the airline's passenger services; however, the underlying law, the tort of intentional infliction of emotional distress, was not addressed exclusively to airline service. Thus, § 1305(a)(1) did not preempt.

Likewise, the court in *Air Transport Ass'n v. P.U.C.*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 1988 found that preemption of

1305(a)(1) did not extend to laws that only affected airlines without being directly related to their services. In *Air Transport Ass'n*, airlines and airline trade associations challenged a California regulation prohibiting telephone customers from surreptitiously overhearing or recording conversations. The airlines wished to monitor conversations between their reservation agents and the public. *Air Transport Ass'n*, 833 F.2d at 201-02. The court stated that the California regulation was not preempted because "[t]he type of telephone operation utilized by the airlines is not peculiar to airlines," and the court could find no evidence that Congress intended to preempt state regulation of utilities when they affected airlines. *Id.* at 207.

Similarly, in the instant case state law simply imposes a duty on all persons entering into contracts to act with good faith and fair dealing. The fact that this duty is applicable to airlines as well as the general public does not invoke federal preemption. We find, therefore, that West's state law claims are not expressly preempted by the FAA.

B. Implied Preemption

In order to show that the FAA impliedly preempts West's claim, Northwest must show that Congress intended that federal law occupy the specific field covered by state law. *ARC America Corp.*, 109 S. Ct. at 1665. Section 1506 of the FAA, however, clearly indicates that Congress had no such intention. Section 1506 reads: "Nothing

contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 49 U.S.C. § 1506 (App. 1982). In force since 1938, this section was specifically retained when Congress enacted the Airline Deregulation Act of 1978 which included the preemption section 1305(a)(1). Section 1506 demonstrates Congress' intent not to preempt all common law remedies.[1] Accordingly, we find that Congress did not impliedly preempt West's state law claims under the FAA.

C. Conflict Preemption

Finally, Northwest asserts that West's claim is preempted due to a conflict with federal law. Specifically, Northwest argues that it could not comply both with the federal regulations governing boarding and state common law. We disagree.

Federal airline overbooking regulations specifically contemplate customers choosing between liquidated damages or state common law remedies. 14 C.F.R. § 250.9(b) (1990). Moreover, the Supreme Court has held that common law remedies in overbooking situations do not conflict with federal priority rules for boarding passengers and providing compensation to bumped passengers.

---

1 Additionally, federal regulations specifically permit a passenger to pursue damages under available state law if they are bumped, 14 C.F.R. § 250.9(b) (1990); this further suggests that Congress had no intention of preempting state common law remedies.

See Nader v. Allegheny Airlines, 426 U.S. 290 (1976). Permitting a bumped customer to forgo liquidated damages in order to pursue a common law remedy might result in different damage awards, but it would not expose Northwest to liability more than once nor would it prevent Northwest from overbooking. Northwest has offered us no reason to believe that requiring it to conform to Montana's duty of good faith and fair dealing would prevent it from following federal regulations.

CONCLUSION

For the foregoing reasons, we find that West's state claim is not preempted by the FAA. In holding that West's state claim for breach of the covenant of good faith and fair dealing is not preempted, we are not deciding whether West has a valid claim. We simply hold that the FAA does not preempt West's state claim. We leave it to the district court to resolve all other issues on remand.

REVERSED.

Supreme Court, U.S.
FILED
OCT 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 90-221 and 90-232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JIM MATTOX, Attorney General of Texas, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-221 and 90-232

JIM MATTOX, Attorney General of Texas, *et al.*,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

The States of Alabama, *et al.*, as *amici curiae*, incorrectly assert that "[i]f state regulatory powers are preempted, the only penalty against an airline or related business engaged in false and deceptive advertising would be a cease and desist order issued by the Secretary of the United States Department of Transportation under 49 U.S.C. App. § 1381." Alabama Br. 8. In response to this incorrect assertion, the Assistant General Counsel for the Department of Transportation ("DOT") has written to counsel for the *amici* States, pointing out that the federal

government's enforcement powers also include both civil and criminal penalties and that substantial civil penalties have been assessed and collected:

> In fact, under Section 901 of the Federal Aviation Act (49 U.S.C. App. § 1471), this Department has the authority to impose civil penalties of up to $1,000 per violation and $1,000 per day for each day of a continuing violation of the pertinent provisions of the Act or any rule, regulation or order issued thereunder. The imposition of criminal penalties is also possible under 49 U.S.C. App. § 1472 for knowing and willful violations of those provisions. Since this Department assumed the powers of the Civil Aeronautics Board over consumer protection in the airline industry in January 1985, we have assessed civil penalties of more than $1,000,000 in consumer protection cases involving violations of Section 411 of the Federal Aviation Act (49 U.S.C. App. § 1381) and have reached substantial settlements involving monetary restitution to consumers.

Letter dated October 4, 1990, from Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings, DOT, to Warren Price, III, Attorney General of Hawaii (attached hereto as Exhibit A).

Counsel for the *amici* States actually had been advised earlier by the General Counsel of DOT that "the Department has issued some fifty orders to cease and desist under section 411 and has assessed civil penalties totalling more than one million dollars. Seven of these orders and nearly $100,000 of the civil penalties have concerned unfair or deceptive fare advertising by airlines." Letter dated August 3, 1990, from Phillip D. Brady, General Counsel, DOT, to Warren Price, III, Attorney General of Hawaii (attached hereto as Exhibit B).

DOT has suggested to counsel for the *amici* States that it would be appropriate "to correct the statement in your brief." Ex. A at 2a. This supplemental brief for respondents is filed in the event that the *amici* States do not choose to make this correction themselves.

For the reasons stated here and in the brief in opposition, the petitions for writs of certiorari should be denied.[1]

Respectfully submitted,

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* Counsel of Record

[1] Respondents' corporate parents and partially owned subsidiaries are listed in the appendixes to the brief in opposition.

EXHIBITS

EXHIBIT

EXHIBIT A

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590
General Counsel

October 4, 1990

Honorable Warren Price, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Re: Nos. 90-221 and 90-232, *Jim Mattox, et al.*, v. *Trans World Airlines, Inc., et al.*, In the Supreme Court of the United States

Dear Mr. Price

Recently you and seven other state attorneys general submitted an amicus brief in support of the above-referenced petitions for writ of certiorari. One statement in your brief reflects an apparent misunderstanding of this Department's enforcement powers which we would like to clarify.

The statement in question is contained in the first sentence of the first full paragraph on page 8 of the brief. It reads—

> If state regulatory powers are preempted, the only penalty against an airline or related business engaged in false and deceptive advertising would be a cease and desist order issued by the Secretary of the United States Department of Transportation under 49 U.S.C. App. § 1381.

In fact, under section 901 of the Federal Aviation Act (49 U.S.C. App. § 1471), this Department has the authority to impose civil penalties of up to $1,000 per violation and $1,000 per day for each day of a continuing

violation of the pertinent provisions of the Act or any rule, regulation or order issued thereunder. The imposition of criminal penalties is also possible under 49 U.S.C. App. § 1472 for knowing and willful violations of those provisions. Since this Department assumed the powers of the Civil Aeronautics Board over consumer protection in the airline industry in January 1985, we have assessed civil penalties of more than $1,000,000 in consumer protection cases involving violations of section 411 of the Federal Aviation Act (49 U.S.C. App. § 1381) and have reached substantial settlements involving monetary restitution to consumers. The fact that we have collected substantial civil penalties in deceptive advertising cases was pointed out in our letter of August 3, 1990, which was sent to you and all other state attorneys general (copy enclosed). In addition, the Secretary's authority to issue enforcement orders has been delegated to various individuals within the Department under 49 CFR Part 1 (See, *e.g.*, 49 CFR 1.57a) and 14 CFR § 302.200 *et seq.* You may thus wish to correct the statement in your brief.

I trust that this information is useful to you and I am sending a copy of this letter to the other attorneys general who joined with you in filing your amicus brief and to the other Counsel of Record in the case. In closing, I would like to reiterate the invitation contained in our August 3 letter for increased cooperation in the area of airline consumer protection enforcement.

Sincerely,

/s/ Samuel Podberesky
SAMUEL PODBERESKY
Assistant General Counsel for
Aviation Enforcement and
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Enclosure

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EXHIBIT B

U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh St., S.W.
Washington, D.C. 20590
General Counsel

Aug. 3, 1990

Honorable Warren Price, III
Attorney General of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813

Dear Mr. Price:

The purpose of this letter is to ask you to join the U.S. Department of Transportation in our efforts to prevent unfair and deceptive practices in the air transportation industry. As you may know, the Department is responsible for implementing and enforcing the Federal Aviation Act of 1958, 49 USC 1301 *et seq.* Section 411 of the Act, 49 USC 1381, prohibits unfair and deceptive practices in air transportation and its sale. In addition to section 411's general mandate, various Department rules, regulations, and policy statements promulgated under section 411 and orders issued under that section govern particular aspects of the air transportation industry, including advertising and other consumer protection matters.

Since the sunset of the Civil Aeronautics Board in 1985, this Department has enforced section 411 aggressively, primarily emphasizing consumer protection. In enforcement actions by the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, the Department has issued some fifty orders to cease and desist under section 411 and has assessed civil penalties totaling more than one million dollars. Seven of these orders and nearly $100,000 of the civil penalties have concerned unfair or deceptive fare advertising by airlines. Addi-

tionally, our Consumer Affairs Office has resolved consumer problems in innumerable cases where enforcement action would not have been appropriate.

The Department staff has enjoyed cordial relationships with many state officials in consumer affairs and Attorney General offices, and worked together with these state officials to resolve many airline consumer problems. However, it is our intention to do everything possible to achieve an even greater level of cooperation as we well recognize that we can carry out our enforcement program much more widely and effectively with your assistance than we can on our own. In fact, your assistance could well be critical in many cases.

Accordingly, we would request that any time that you become aware of any unfair or deceptive practice in the airline industry or any other potential violation of the Federal Aviation Act or our implementing regulations and policy statements (14 CFR Parts 200-399), contact should be made with Hoyte Decker, Chief of our Consumer Affairs Office (202-366-5957), or Sam Podberesky, Assistant General Counsel for Aviation Enforcement and Proceedings (202-366-9342). By working together we will certainly achieve the greatest possible success in protecting airline consumers. Your assistance in this important undertaking is very much appreciated.

Sincerely,

/s/ Phillip D. Brady
PHILLIP D. BRADY
General Counsel

No. 90-221
No. 90-232

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1990

JIM MATTOX, ATTORNEY GENERAL OF TEXAS,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATES OF ALABAMA, HAWAII, INDIANA, MISSISSIPPI, NEW JERSEY, PENNSYLVANIA, UTAH AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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No. 90-221
No. 90-232

In The

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JIM MATTOX, ATTORNEY GENERAL OF TEXAS,

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On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATES OF ALABAMA, HAWAII, INDIANA, MISSISSIPPI, NEW JERSEY, PENNSYLVANIA, UTAH AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, the States of Alabama, Hawaii, Indiana, Mississippi, New Jersey, Pennsylvania, Utah and Virginia as amici curiae, respectfully submit this brief in support of the petitions for writ of certiorari submitted by the State of Texas in No. 90-221, and the State of California and 32 other states (hereinafter, "thirty-three states") in No. 90-232, both seeking review of the decision of the United States Court

of Appeals for the Fifth Circuit issued April 3, 1990, and reported at 897 F.2d 773, affirming the order of the United States District Court for the Western District of Texas, granting a preliminary injunction to respondents. The decision of the District Court is reported at 712 F.Supp. 99. The decision of the Circuit Court merits review and reversal by the Court, since there is a split in the Circuit Courts of Appeals on the preemption question raised by these petitions[1] and since the thirty-three states' due process rights have been violated.

INTEREST OF THE AMICI CURIAE

The amici are some of sixteen states not subject to the injunction appealed from in these petitions.

Pursuant to the police power, each of the amici States have enacted laws to prevent unfair and deceptive acts and practices.[2] These statutes have been broadly applied to protect not only the consumers of goods and services residing in the amici States, but also to others within those States, including the many travellers who, upon

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[1] The Circuit split is annotated in the thirty-three states' petition in No. 90-232 at ii. We note that the Ninth Circuit very recently interpreted the preemptive effect of 49 U.S.C.App. § 1305(a)(1) inconsistently with the interpretation given that statute by the Fifth Circuit in this action. *West v. Northwest Airlines, Inc.*, 1990 WestLaw 128847, 1990 U.S. App. LEXIS 15793 (9th Cir. Sept. 11, 1990).

[2] *E.g.*, Ala. Code § 8-19-1, *et seq.* (1975); Haw. Rev. Stat. § 480-2, *et seq.*, (1985); Ind. Code § 24-5-0.5; Miss. Code Ann. § 75-24-1 *et seq.* (Supp. 1990); N.J. Stat. Ann. § 56:8-1, *et seq.*; Pa. Stat. Ann. Tit. 73, § 201-2, *et seq.* (Purdon Supp. 1990); Utah Code Ann. § 13-11-1, et seq. (1988); Va. Code §§ 59.1-196 to 207.

arrival in an amici State find that they have been victims of an unfair or deceptive act involving airline promotional activity.

The air travel industry plays a vital role in the economies of the amici States by providing transportation to travellers who will purchase goods and services in the States. The high cost of air transportation, relative to many consumer transactions, makes it an area that is ripe for abuse by the unscrupulous, and hence, the need for rigorous enforcement of State law guarding against unfair and deceptive acts and practices is great. Great, too, is the States' interest in assuring that consumers have access to advertising information that is not misleading in order that they may make informed decisions about their travel options.

The amici States have a substantial interest in preserving the historic assumption that the enforcement of consumer protection laws, as an aspect of state police powers, should not be superseded by a federal statute except by a clear and manifest expression by Congress.

These vital and substantial interests warrant the submission of this amici brief in support of petitioners' efforts to obtain review by this Court of the lower courts' decision to prevent thirty-four sovereign States from enforcing their unfair and deceptive practice statutes against false advertising by airlines.[3]

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[3] The fact that a permanent injunction has been filed in this case does not mean that this appeal is moot or is not ripe for decision. Although courts have dismissed appeals of preliminary injunctions after a permanent injunction has been

(Continued on following page)

SUMMARY OF ARGUMENT

Historically, the States have exercised the power to protect their citizens from unfair and deceptive business

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(Continued from previous page)

filed, *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 588 (1926); *Continental Training Services, Inc. v. Cavazos*, 893 F.2d 877, 880 (7th Cir. 1990); *United States v. Local 30, United Slate Tile & Composition Roofers*, 871 F.2d 401, 403 (3d Cir. 1989), the facts of this case are such that the issues presented by the appeal of the preliminary injunction can be decided at this time.

The permanent injunction filed in this case is almost identical to the preliminary injunction in its findings, reasoning, and conclusions. If this appeal was dismissed, and appellants were required to begin the appeal process anew with an appeal of the permanent injunction, then the Circuit Court would certainly reaffirm its earlier ruling in the case and the case would then be brought before this court in the same posture as it is now. Requiring appellants to appeal the same order again to the Circuit Court would be requiring appellants to go through a futile exercise that wastes the resources of this Court and the Circuit Court.

In the analogous situation of the requirement in administrative law that administrative remedies be exhausted prior to judicial review, the Court has created an exception so that futile actions by appellants are not required. For example, in discussing appeals of cases under the Education of the Handicapped Act, the Court stated:

> It is true that judicial review is not normally available under § 1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate.
>
> *Honig v. Doe*, 484 U.S. 305, 326-7 (1988).

(Continued on following page)

practices through the police power. The Fifth Circuit Court of Appeals erroneously held that the federal regulatory scheme in the field of commercial air transportation preempts the States' right to protect their citizens. This construction of the applicable federal law, 49 U.S.C.App. § 1305, is incorrect.

The Fifth Circuit also erred in holding that there was personal jurisdiction over the thirty-three attorneys general who were made parties to this litigation against their will and without notice or an opportunity to be heard. This holding violates the due process rights of those thirty-three attorneys general, and ignores the substantive law of intervention.

(Continued from previous page)

This case is not similar to *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), where the Court held that the appeal was not ripe because administrative action was not complete. In that case the respondent argued that its property was taken by the local government as the result of a land use law, but the court held that because respondent failed to try to get zoning variances, no final decision had been made by the local government. In this case, however, the Circuit Court has considered all of appellants' claims, and there are no unresolved issues which need to be addressed by another court or agency.

ARGUMENT

I. IT IS A TRADITIONAL POWER OF THE STATES TO PASS AND ENFORCE LAWS TO PROTECT CONSUMERS FROM DECEPTIVE ADVERTISING PRACTICES AND THIS POWER HAS NOT BEEN PREEMPTED IN THE FIELD OF AIRLINE PROMOTIONAL ACTIVITY.

The Fifth Circuit Court of Appeals was wrong in finding that Congress has specifically preempted the States' traditional power to guard against fraudulent advertising in the field of air transportation. The protection of consumers from unfair and unlawful practices is an area traditionally regulated by the States pursuant to their police powers. *See, California v. ARC America Corp.*, 109 S.Ct. 1661 (1989); *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Automobile Importers of America v. Minnesota*, 871 F.2d 717 (8th Cir. 1989); and *Chrysler Corp. v. Texas Motor Vehicle Comm.*, 755 F.2d 1192, 1205 (5th Cir. 1985). The States generally guard against unfair and deceptive business practices through statutory provisions which proscribe these activities.

The courts below ignored the presumption against finding preemption of state law in areas traditionally regulated by the States. *California v. ARC America*, 109 S.Ct. at 1665. The Circuit Court construed the language "relating to routes, rates and services" contained in 49 U.S.C.App. § 1305(a)(1) as a talisman to preempt all state regulation relying on *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). However, the ERISA preemption upheld in *Shaw* based upon the words "relating to" in 29 U.S.C.

§ 1144(a) was premised upon a statutory scheme that is more broadly worded to evidence Congressional intent to preempt state regulation than the one before the Court here.

In the instant situation, Congress could easily have preempted all state regulation by stating that the federal law preempted all state laws "relating to air transportation". The specific language used by Congress, however, deals only with three areas: rates, routes and services. This is particularly significant. As this Court held in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), common law remedies for fraudulent misrepresentation were *not* preempted in the airline area. This holding predated the passage of 49 U.S.C.App. § 1305. If Congress had desired to specifically eliminate state law remedies, it could have done so, but did not.

The business of airlines and their agents is not to falsely advertise or fraudulently misrepresent their products. Deceptive advertising is not a "route, rate, or service" of the airlines. It is possible that false advertising would include a description of a rate, route, or service, and under the Fifth Circuit's interpretation, an airline or other business using such false advertising would, in effect, be immune from state unfair trade practices statutes. Such a finding would exempt the airlines, ticket agencies and other air transportation companies from complying with statutes adopted under traditional state police power protecting consumers.

The practical immediate effect of the Circuit Court's holding is that a business could avoid any type of state prosecution for fraudulent misrepresentation as long as

there was even the most tenuous relationship between the misrepresentation and airline rates, routes, or services. For example, a ticket agent could engage in "bait and switch" techniques, advertising a particular low price and then switching the price of the actual travel. Under the Fifth Circuit's interpretation, since the advertising mentions a rate, this consumer fraud could not be prosecuted under state law.

If state regulatory powers are preempted, the only penalty against an airline or related business engaged in false and deceptive advertising would be a cease and desist order issued by the Secretary of the United States Department of Transportation under 49 U.S.C.App. § 1381. State regulatory laws typically allow a much wider range of enforcement options, including treble and punitive damage actions to prevent deceptive practice activities. If Congress intended to so profoundly usurp traditional state police powers, surely a clearer expression of that intention would have been given than the one found in 49 U.S.C. § 1305(a)(1).

II. THE FINDING THAT THE TRIAL COURT HAD PERSONAL JURISDICTION OVER THE THIRTY-THREE STATES VIOLATES NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE, AND IGNORES THE PROCEDURE FOR INTERVENTION BY STATES SET OUT BY CONGRESS AND THE FEDERAL RULES OF CIVIL PROCEDURE.

The District Court made the attorneys general representing thirty-three states parties to litigation in the Western District of Texas without the requisite facts or law to support a finding of jurisdiction. The Court's finding of

personal jurisdiction over the thirty-three attorneys general violates traditional due process requirements,[4] and ignores federal statutory and rule law.

The Circuit Court recognizes that the thirty-three states did not appear as parties and had not made any motion to intervene in the case. *Trans World Airlines v. Mattox*, 897 F.2d 773, 786-7 (5th Cir. 1990). Forcing individual states to be parties to a lawsuit and applying an injunction to them after the injunction has issued denies these states the most fundamental due process rights: notice and an opportunity to be heard.

The decisions below ignore this Court's long held view that personal jurisdiction must not violate "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310 at 316 (1945). Most recently, this Court, in *Burnham v. Superior Court of California*, 58 L.W. 4629 (U.S., May 29, 1990) stated that jurisdiction caselaw makes a distinction between "novel, nontraditional assertions of jurisdiction," which are constitutionally suspect, and "traditional," and hence, constitutional grounds for jurisdiction. *Id.* at 4633. Surely the assertion of jurisdiction over the thirty-three states here is constitutionally suspect.

In its decision finding *de facto* jurisdiction, the Fifth Circuit cited *Cactus Pipe & Supply v. M/V Montmartre*, 756 F.2d 1103 (5th Cir. 1989) to support the proposition that the thirty-three attorneys general had effectively waived the personal jurisdiction issue. *Trans World Airlines, Inc. v.*

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[4] Clearly, States are entitled to due process protections. *See, e.g, Block v. North Dakota*, 461 U.S. 273, 291 (1983).

Mattox, 897 F.2d at 786. However, *Cactus Pipe* indicates that personal jurisdiction may be found only if a party enters a case and if certain conditions are met. *Ibid.* at 1108. Those conditions include failing to object to jurisdiction and requesting that the court take some affirmative action "on its behalf in some substantive way." *Id.* The conditions were not met in the instant case.

First, none of the thirty-three states had entered the case and only Texas had been made a party to this action prior to the injunction motion. As the Circuit Court recognized, there was no question raised about jurisdiction as neither the airlines (respondents here) nor Texas had sought to include the thirty-three states in the litigation. As further recognized by the Circuit Court, the pleading filed by the thirty-three states included an expression that they were "specially appearing" before the court. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d at 786. There was no meaningful failure by the states to object to personal jurisdiction, because there was no clue that jurisdiction over them had been asserted. Further, at the very least, the "special appearance" by the thirty-three states can only be construed to mean that the states objected to any attempt by the District Court to assert jurisdiction over them. Thus, the first requirment under *Cactus Pipe* to find personal jurisdiction was never met.

Secondly, the brief filed in the District Court by the thirty-three attorneys general asked that the respondents' motion for temporary restraining order against Texas be denied, or that the hearing time be extended, and not that any particularized, substantive relief be given in their favor. The Circuit Court noted that the airlines' motion sought injunctive relief only against Texas. *Id.* at 786.

Thus, under the facts presented as applied to the test in *Cactus Pipe*, the second condition to find personal jurisdiction is absent as well. Thus, the District Court ignored the clear requirements of controlling circuit precedent set out in *Cactus Pipe* and found jurisdiction.

The point, of course, is not that the Fifth Circuit has been disingenuous in its interpretation of its caselaw. It can interpret its precedent however it pleases, within the bounds of the Constitution. The point is that here, the thirty-three states came to the Western District of Texas without a clue that controlling circuit precedent would be radically interpreted and applied to them retroactively. The District Court, in effect, snared thirty-three states into litigation where the states had no opportunity to comment on the propriety of their joinder, and no opportunity to opt out. Surely, this is a deprivation of due process. *Cf., Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 679 (1930).

Congress has devised the means by which states may intervene in federal litigation where the constitutionality of state law "is drawn into question". That procedure is set out in 28 U.S.C. § 2403(b), and it requires that the federal court certify the constitutional question to the state attorney general, and afford the state an opportunity to intervene. Here, the district court acted illegally in ignoring the requirements of 28 U.S.C. § 2403(b).

In addition, the Circuit Court read Rule 24, F.R.Civ.P. out of existence. That rule allows intervention both as a matter of right and with permission of the court. In either situation, a timely motion must be made indicating the basis upon which intervention is being requested.

F.R.Civ.P. 24(c) requires that the motion be filed with the court and served upon the parties. Under this procedure, the intervenor and the other parties have notice of the motion and an opportunity to comment.

Thus, the lower courts completely ignored the provisions of 28 U.S.C. § 2403(b) and F.R.Civ.P. 24 and the due process protections inherent in them. There was no certification of the constitutional question, no motion filed stating the grounds for intervention and no supporting documentation. In fact, the parties were only informed of their "intervention" after the court had ruled on the injunction motion. This made it impossible for the thirty-three states to contest the *"de facto"* intervention, the finding of jurisdiction and the injunction to which they were now subject. Clearly the lower court failed to satisfy this Court's standard for personal jurisdiction by inventing and applying a "novel" jurisdictional device, "de facto intervention", that does great violence to traditional notions of fair play and substantial justice.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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